TRANSCRIPT OF RECORD

upreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

vs.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 19, 1956
CERTIORARI GRANTED FEBRUARY 25, 1957

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

AMENDED ANSWER—Filed November 15, 1955

The defendant, answering the Complaint of the plaintiff, respectfully shows to the Court:

I

That defendant denies each and every allegation of the Complaint not hereinafter expressly admitted.

II

The defendant alleges that it does not have sufficient information to form a belief as to the place of residence of the plaintiff and, therefore, denies the allegations of the Complaint in this regard.

III

The defendant admits that portion of Paragraph I and III of the Complaint that alleges the defendant to be a Corporation organized and existing under the laws of the State of South Carolina and engaged in the business of supplying, transmitting and distributing electric power in Anderson, Oconee, Pickens and Greenville Counties in the State of South Carolina; and in this connection the defendant alleges that it is a Cooperative, chartered under the laws of the State of South Carolina, to provide electrical service to rural residents in the counties aforesaid.

b

IV

The defendant admits upon information and belief that on or about February 17, 1953, and for a time prior thereto, [fol. B] the plaintiff was engaged in construction work at or near a sub-station being constructed in the County of Oconee, South Carolina, but this defendant alleges that it had neither possession nor control of said sub-station on the date aforesaid.

V

The defendant admits upon information and belief that on or about February 17, 1953, the plaintiff received certain injuries as a result of being shocked and burned, but the defendant expressly denies the allegations of Paragraph V, VI, VII and VIII of the Complaint.

VI

The defendant alleges that on the date of February 17, 1953, and prior thereto, the plaintiff was an employee of the construction firm of R. H. Bouligny, Inc.; that at the time the injuries of the plaintiff were sustained, the said R. H. Bouligny, Inc. had entered into a contract with this defendant whereby R. H. Bouligny; Inc. agreed to construct certain transmission lines and sub-stations for this defendant including the sub-station mentioned in the Complaint near Walhalla, South Carolina; that at the time of the accident alleged in the Complaint, the plaintiff was engaged in the course of his work for his said employer. *THE DEFENDANT ALLEGES THAT THE SAID R. H. BOULIGNY, INC. WAS OPERATING UNDER THE REQUIREMENTS AND IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THE SOUTH CAROLINA WORKMEN'S COMPENSATION LAW. THE DEFENDANT IS IN-

* The portions of Paragraphs VI and VII of the Answer set in capital letters were excluded from the Answer by the District Judge at the conference immediately preceding the beginning of the trial. These portions of the Answer were excluded from the jury on the basis that issues presented by such allegations were admitted by the Plaintiff. (Tr. 2-34.) The portion of Paragraph VII of the Answer in italics was read to the jury and testimony offered on this allegation but was stricken by the Trial Judge upon motion of Plaintiff's attorney at the close of the testimony. (Tr. 353-359.)

FORMED AND BELIEVES THAT SUBSEQUENT TO SUSTAINING HIS [fol. C] INJURIES, THE PLAINTIFF FILED CLAIM IN THE MANNER PROVIDED BY LAW AND COLLECTED FULL BENEFITS FROM HIS EMPLOYER FOR ALL SUCH INJURIES AND MEDICAL EXPENSES INCURRED AS PROVIDED UNDER THE WORKMEN'S COMPENSATION ACT OF SOUTH CAROLINA. The defendant alleges that any negligence and carelessness that may have occurred as the direct and proximate cause of plaintiff's injuries was solely and entirely that of the said R. H. Bouligny, Inc., the employer of the plaintiff, through its agents, servants and employees.

VII

THAT AT THE TIME THE PLAINTIFF SUFFERED HIS ALLEGED INJURIES, THE DEFENDANT, BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., HAD ELECTED TO COME UNDER THE WORKMEN'S COMPENSATION LAW OF SOUTH CAROLINA AND IT WAS PROPERLY QUALIFIED TO DO SO; THAT THE DEFENDANT HAD BEEN OPERATING UNDER THE WORKMEN'S COMPENSATION LAW OF THE STATE OF SOUTH CAROLINA FOR SOME YEARS PRIOR TO THE TIME OF THE ACCIDENT AND IS STILL OPERATING THEREUNDER. *That R. H. Bouligny, Inc., the employer of the plaintiff, was engaged in the performance of a contract with this defendant that included the construction of a sub-station and the plaintiff was working on this sub-station when his injuries were sustained; that the construction of the sub-station by the said R. H. Bouligny, Inc. pursuant to the terms of said contract was a part of the trade and business of this defendant* AND THE PLAINTIFF, BEING AN EMPLOYEE OF THE SAID R. H. BOULIGNY, INC., HAS NO RIGHT TO RECOVER AGAINST THIS DEFENDANT IN A COMMON LAW ACTION FOR TORT, BUT THAT THE RIGHTS OF PLAINTIFF TO COMPENSATION BY THIS DEFENDANT FOR ANY INJURIES WHICH HE SUSTAINED ARE LIMITED TO AND DETERMINED BY THE WORKMEN'S COMPENSATION LAW OF THE STATE OF SOUTH CAROLINA. THAT THE PLAINTIFF, HAVING ELECTED TO RECOVER COMPENSATION AGAINST HIS EMPLOYER, R. H. BOULIGNY, INC., AND ITS COMPENSATION CARRIER, [fol. D] ALL OF WHICH WILL MORE FULLY APPEAR BY REFERENCE TO RECORDS IN THE OFFICE OF THE SOUTH CAROLINA INDUSTRIAL COMMISSION, I. C. FILE NO. 5303088, THE SAID PLAINTIFF IS BARRED TO RECOVER FROM THIS DEFENDANT EITHER AT COMMON LAW OR UNDER THE WORKMEN'S COMPENSATION LAW.

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

(Anderson Division)

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

Greenville, S. C.
November 28, 1955

Before: Hon. C. C. Wyche, U. S. District Judge.

APPEARANCES:

Henry H. Edens, Esq., Henry Hammer, Esq., and William E. Chandler, Jr., Esq. (Columbia, S. C.), for the plaintiff.

Ray R. Williams, Esq., and Wesley M. Walker, Esq. (Greenville, S. C.), for the defendant.

[fol. 2] (After preliminary discussion, the following was had in Chambers, with all counsel present.)

* * * * * * *

Mr. Hammer: The only part of that defense, it is a good defense but they shouldn't be permitted to plead irrelevant and immaterial matters which would cloud the issues. The only part of their defense that is proper is that defendant has elected to come within the Act; (2) that the plaintiff is [fol. 3] an employee of the defendant even though he was employed by the independent contractor and, therefore, if he is an employee within the meaning of the Act, his exclusive remedy is proceeding under the Workmen's Compensation Act. Anything else is immaterial: whether he

brought a proceeding or didn't against his immediate employer, whether he got paid or didn't get paid makes no difference. They are entitled to a complete bar in this action if they prove those three elements, and anything else—for instance, they say that the defendant——

The Court: As I started out to say in the very beginning, what you are doing now, you are moving that they not be allowed to read that defense before the jury because it is a legal defense, purely a question of law and must be decided on legal grounds? Is that what you are moving for?

Mr. Hammer: That's the first motion. Secondly, in the event they are allowed to read it, they should read only that part that is material. They should be confined to the part that alleges, (1) they elected to come under the Act; (2) that the plaintiff is an employee of the defendant, within the meaning of the Act; and if he is an employee of the defendant within the Act, he is barred from bringing this action whether he's recovered compensation or not from any other source.

* * * * * * *

[fol. 5] The Court: Have you got evidence to that effect?

Mr. Walker: Yes, sir, we have the Industrial Commission file. We have the Secretary of the Industrial Commission. We would have the papers that he signed, one being the agreement for compensation, that he executed with the Bouligny insurance carrier, and that is an agreement to [fol. 6] take compensation. Now, all of that is on file with the South Carolina Industrial Commission and we have subpoenaed the Secretary here with the records. We say that—in our Answer we allege that—he was an employee of Bouligny. Now, we must prove, as I see it, and we would have the right to cross-examine him about it, that he took his compensation from Bouligny.

The Court: Looks to me like what Mr. Walker says is correct. In other words, his defense is—and even according to you it looks like he is correct—his defense is that your client elected to go under Workmen's Compensation. That is his defense. If that is his defense, he's got a right to prove it.

Mr. Hammer: Election is not a defense, your Honor.

The Court: He not only elected but received compensation under it.

Mr. Hammer: That is still not a defense. The only defense is if he was an employee of the defendant within the Act.

The Court: He would have a chance to prove that.

Mr. Hammer: Whether he elected to receive compensation from the independent contractor or not, this is a suit against the third party and a third party has no right——

The Court: Let me see if I follow you: You say it makes no difference whether he elected to come under it or not? [fol. 7] Right?

Mr. Hammer: Right.

The Court: Your next point is it makes no difference whether he received compensation?

Mr. Hammer: Correct.

The Court: What does make a difference?

Mr. Hammer: The only thing that makes a difference is if he is an employee within the meaning of the Act, employee of the trade, business or profession of the defendant, if he is——

The Court: He can prove that, can't he?

Mr. Hammer: And that's as far as he's got to go to sustain his defense and if he doesn't sustain his defense——

The Court: Let me see if I follow you, because I don't know anything about this Workmen's Compensation law and don't want to learn except for this case. I don't know anything about it and I am not at my age trying to learn something about it. What you want to do is to strike everything out of his Answer except he was an employee of this concern, whatever it was. I don't know the name of it.

* * * * * * *

The Court: State what you are willing to leave in there. [fol. 8] Mr. Hammer: That they be permitted to set up as a complete defense to this action only that the defendant (1) elected to come within the operation of the Workmen's Compensation Act; (2)——

The Court: I thought you said it wasn't necessary for them to prove it.

Mr. Hammer: The defendant, not the employee.

The Court: The defendant.

Mr. Hammer: (2) That the employee, although he is an employee of the independent contractor Bouligny, was engaged in the performance of work which is part of the trade, business and occupation of the defendant power company. And if he proves those two elements, everything else is immaterial. And if he doesn't prove those two elements, the introduction of any collateral matter would be prejudicial to the plaintiff insofar as indicating he's received benefits from another source and under the law they are not entitled to prove such benefits in mitigation of damages.

The Court: You are willing, then, as I understant, to admit—not to be published before the jury, but for the purpose of any motion made upon the law in the case—you are willing to admit he did receive compensation in the amount he did receive?

Mr. Hammer: Yes, sir.

The Court: On the record, but not in the presence of [fol. 9] the jury. * * *

* * * * * * *

[fol. 11] Mr. Hammer: I will admit that the defendant elected to come under the Act.

Mr. Walker: He admits we are operating under the Act.

Mr. Williams: As I understand, it is admitted this, then: that both Blue Ridge and Bouligny elected to and came under Workmen's Compensation. That is admitted on the record.

The Court: Right.

Mr. Williams: The only other question left would be whether or not this was part and parcel of the business of Blue Ridge. In other words, was—the only question that [fol. 12] would be left is: in the meaning of the Workmen's Compensation Act, was the plaintiff the employee of Blue Ridge Electric? That would be the only question left.

Mr. Hammer: That's correct.

* * * * * * *

[fol. 28] The Court: I am going to let you prove anything you want to prove outside the presence of the jury on this Workmen's Compensation Act. As far as the trial of this case before the jury is concerned, as I said before, it's dwindled into a very narrow issue, as I see it. I may be

wrong. The Circuit Court of Appeals may say I am wrong. But I think as far as the Workmen's Compensation proposition is concerned, it's purely a question of law; * * *

* * * * * * * *

[fol. 120] LEON SANDERS, first being duly sworn, testified as follows:

Direct examination.

By Mr. Edens:

Q. What is your name?
A. Leon Sanders.
Q. And you live where?
A. Seneca, South Carolina.
[fol. 121] Q. Did you work on this job with Mr. Wilson who just testified?
A. I did.
Q. What work did you do? What was your classification?
A. A groundman.
Q. Did your daddy work on that same one?
A. He did.
Q. Is your daddy still alive?
A. No, sir, he died.
Q. Do you recall the construction on the Friday preceding the following Tuesday when Mr. Byrd was injured?
A. I do.
Q. Where were you working that day?
A. Well, I was about the first one got finished that evening. Just before the linemen got done.
Q. Where did you end up?
A. Substation.
Q. You were at the substation?
A. Yes, sir.
Q. Will you tell me who else was at the substation when they finished up that day—when you finished up?
A. Me and my father and Mr. Moss and Mr. Phillips.
Q. Was Mr. Moss there after the line was finished, completed running into that substation?
A. He was.
[fol. 122] Q. Was Mr. Moss in a position to see that the line into the substation had been completed?

A. Yes, sir, if he had been looking, he could.

Q. Was he in a position where he could see it? Was he up there with the others?

A. Yes, sir.

Q. Did he receive any instructions from Mr. Phillips while you were there, or any advice from Mr. Phillips concerning the work?

A. Yes, he did after he finished up.

Q. What happened?

A. Mr. Phillips told Mr. Moss he was finished with the line plumb into the substation and he would go check with the engineer and see everything was okay.

* * * * * * *

[fol. 123] Cross examination.

By Mr. Walker:

* * * * * * *

Q. In order for you to work in that area the way you worked that day, the lines had to be de-energized? Isn't that correct?

* * * * * * *

The Witness: I didn't know anything about the electricity business. I didn't do that kind of work. I was just a groundman.

* * * * * * *

[fol. 124] Q. You say if Mr. Moss had looked, he could have seen this jumper running across the double dead-end pole?

A. Yes, sir, we was standing together looking up at it.

* * * * * * *

[fol. 150] Leon Sanders, recalled, testified as follows:

Direct examination.

By Mr. Edens:

Q. Mr. Sanders, on yesterday you stated that when you finished up work that Mr. Phillips and Mr. Moss and you and one or two others were at the sub-station?

A. Yes, sir.

Q. And you referred to instructions which Mr. Phillips [fol. 151] or information or what instructions which Mr. Phillips gave to Mr. Moss. There is some question about—in my mind—as to just what you said with reference to what Mr. Phillips told Mr. Moss. What did you say with reference to the instruction which Mr. Phillips gave to Mr. Moss? Did you say that Mr. Phillips told Mr. Moss he would or should check with the engineer?

* * * * * * *

[fol. 152] The Witness: He should.
The Court: He should?
The Witness: Yes, sir.

By Mr. Edens:

Q. That who should?
A. That Mr. Moss should.
Q. Mr. Moss should check with the engineer?
A. Yes, sir.

* * * * * * *

[fol. 155] The Court: Under the Rules of Civil Procedure.

(Mr. Edens published the following portions of the Deposition of Ira Moss, taken before Jacqueline P. Peace, Notary Public for South Carolina, on the 6th day of April, 1955.)

* * * * * * *

[fol. 155a] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION

Civil Action No. 1523

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

DEPOSITION OF IRA MOSS taken April 6, 1955

* * * * * * *

MR. IRA MOSS, being duly sworn, testified as follows:

Examination.

By Mr. Hammer:

Q. You are Ira Moss?
A. Ira Moss, Yes, Sir.
Q. Where do you reside, Mr. Moss?
A. Well, Walhalla, Route 1, Walhalla.
Q. How long have you resided there?
A. Around fourteen years.
Q. By whom are you now employed?
[fol. 155b] A. Blue Ridge Electric Cooperative.
Q. How long have you been employed by them?
A. Since June, 1944, I believe.
Q. In what capacity have you worked for them, Mr. Moss?
A. Well, lineman and sort of assistant foreman sometimes.
Q. And what do you do as a lineman? What do your duties consist of?
A. Just general line work, whatever is required.
Q. Do you check the lines?
A. Well, I mostly work on lines, just for building and adding new services and just general maintenance.
Q. You maintain the lines?
A. Right.

* * * * * * *

[fol. 155c] Q. Who was doing the construction of the new lines?
A. Bouligny Construction Company.
Q. Did you see what lines were being constructed?
A. Well, I worked with the conversion, yes, sir.
Q. And you knew of all the lines that were tied into the conversion?
A. I knew, Yes, Sir. I knew most all about what was being built at that time, the conversion, etc.
Q. And when work was done on the conversion, who would de-energize the lines?

A. I would.

* * * * * * *

[fol. 155d] Q. And before you put the energy back into the lines, I assume you were careful enough to make an inspection to see if everything was all right?

A. Mr. George Phillips was foreman. I de-energized and energized at his request. I worked directly with him at that time.

Q. Mr. George Phillips?

A. Mr. Phillips, Sr.

Q. He was your foreman?

A. He was foreman for Bouligny Construction Company.

* * * * * * *

[fol. 155e] Q. And how do you know what was done, according to what was supposed to be done?

A. We gave a contract to do line work, they go and they have a meeting with the engineers and the people that's to do the work. They have maps and they plan the job. They know what is to be done and have men that is qualified to carry on that work.

* * * * * * *

[fol. 155f] Q. Did he tell you what work he did each day?

A. Not necessarily, no, Sir.

Q. How would you know what work he was doing each day?

A. It didn't make too much difference what he did as far as I was concerned. My main job was to de-energize a line while he was working.

Q. I understand. But how would you know what work he had done each day?

A. I didn't, as far as that was concerned. It was no concern of mine. He had plans, those people worked directly with the engineers in charge of construction and he had plans. As far as knowing what he did, I didn't. I knew the section he was working at and what it would take to de-energize that section. That's all I did, de-energize the [fol. 155g] line and make it safe for him. I grounded it out. After I put the ground on it, I put protective grounds on that in case anything should happen.

* * * * * * *

[fol. 155i] Q. Had that sub-station been energized before Byrd was hurt?

A. It wasn't supposed to be. I had nothing to do with that. There was two types of jobs going on at that time, [fol. 155j] two new sub-stations being built which was entirely new stuff and that conversion was doing, that was what I was interested in. I had nothing to do at all with the sub-station at Walhalla or Pickens. That was entirely new stuff. I didn't work around it at all. In fact, I rarely went there because Mr. Haas was in charge of that. Nothing was energized there. I had no business there at all.

* * * * * * *

[fol. 155k] Q. Wasn't part of that line cut off and the new route made?

A. They had built a new part to this line. That is, they had built it back to the sub-station. They hadn't been turned over to us, that was entirely Southern Engineering and Bouligny contracting at that time. We had nothing to do with that. The only thing we were interested in was to keep our customers that was served off this particular line, to see they had sufficient current during all this operation and they had to always arrange that they could keep the power on the larger percentage of the time and that wasn't for us to figure at all. That was Southern Engineers and Bouligny Construction Company.

* * * * * * *

Q. Let me ask you a question. You turned off the current from the same place where you turned it on, is that right? After you were informed of the accident that Byrd had?

A. Yes, Sir. I took it off and took down the jumpers that they had put on their, Bouligny's men.

Q. Where were those jumpers?

[fol. 155l] A. The jumpers should have been—not have been, there, which was a grave mistake of Mr. Bouligny's men that did it. It was not twenty-four steps of where Mr. Byrd got hurt.

Q. Twenty-four steps of where Mr. Byrd got hurt?

A. That's right. Any new line—any time, contractors are not supposed to put up any jumper on anything connecting any line until that line is complete and they are

through with that line and it is turned over to the cooperative and then we are to put up all jumpers to make any line hot on any new construction, which was the oversight of Mr. Bouligny's men that connected the jumpers, which shouldn't have been. That was a grave mistake of theirs.

* * * * * * *

[fol. 155m] Q. When you put the energy on, didn't you know what lines were hotted up and what were not hotted up?

A. The ones I energized was to serve Ebenezer Community. They wasn't supposed to go into any sub-station. They wasn't supposed to be hot for thirty days yet. Even before that Southern Engineers—on any new construction—any engineering company, if you are familiar with those contracts, we are not allowed to bother any new construction until after Southern Engineers has checked it and approved it and signed a release to us on it.

* * * * * * *

[fol. 155n] Q. New stuff is not supposed to be dangerous?

A. No, Sir. Unless they make it so themselves. We didn't

A. No, Sir. Unless they make it so themselves. We don't have anything to do with it until it is released to us.

Q. This was a new line though that was running into the sub-station, was it not?

A. That's right. We didn't have a thing in the world to do with it and we wasn't supposed to be around it and wasn't around it.

* * * * * * *

[fol. 160] Mr. Edens: This is the deposition of Mr. A. J. Hurt, taken on the 11th of March, 1955.

(Mr. Edens publishes the deposition as follows.)

* * * * * * *

[fol. 160a] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA; ANDERSON DIVISION

Civil Action No. 1523

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Defendant.

DEPOSITION OF A. J. HURT, TAKEN MARCH 11, 1955

* * * * * * *

MR. A. J. HURT, being duly sworn, testified as follows:

Examination.

By Mr. Hammer:

Q. Your full name is what, Sir?
A. Alvin Judson Hurt.
Q. Where do you live, Sir?
A. I live in Easley.
Q. And what is your occupation?
A. I am Manager of the Blue Ridge Electric Co-op in Pickens.
Q. And how long have you been Manager?
A. Since the beginning. 1939, I believe, when we organized.
[fol. 160b] Q. You were Manager of the Blue Ridge Electrical Co-op on February 17, 1953 when Mr. Byrd was injured?
A. Yes, sir.
Q. And where are you stationed, Mr. Hurt?
A. I live in Easley. We have an office in Pickens and one in Westminister, Sir.
Q. Have you ever had occasion to visit the sub-station at Walhalla?
A. Not while the work was going on, no, Sir. Not until after it was turned over to us.

Q. Have you ever seen the lines before they were connected up? The new lines I have reference to.

A. I will answer it this way, Sir. My work takes me by there in going to Westminster and, naturally, I would look at the lines, all our lines, going from Pickens to Westminster. Yes, Sir.

Q. Did you make any observation as to the date the new line from the sub-station connecting to the old line was put up?

A. No, sir. Not until we accepted the lines, Sir.

Q. And when did you accept the line?

A. We accepted the lines on March 19, 1953.

Q. That's approximately one month and two days after the injury?

A. According to what I have heard here, yes, Sir.

Q. Where do the lines running from the place that the new line was connected, extend?

A. Let me make myself clear at the beginning, Mr. Hammer. We contracted this work, sir, and we had Southern Engineering Company in Atlanta, that did our engineering and so it was not my job, Sir, to have anything to do with [fol. 160c] that work. It was under a Resident Engineer, Mr. Shealy, for Southern.

Q. Mr. Shealy was the Resident Engineer?

A. Resident Engineer, yes, Sir.

Q. And it was he and Bouligny that were responsible and did all the work until the lines were officially accepted by the Blue Ridge Electric Co-op?

A. Yes.

* * * * * * *

Q. Did you make an investigation of the injury when it happened?

A. No, Sir.

Q. Do you know who made the investigation?

A. No, Sir.

Q. Was any investigation made?

A. I don't know, Sir. Not for the Blue Ridge Co-op because Mr. Byrd was not our man, Sir.

Q. And you felt that you were only responsible for your men that were hurt?

A. That was all I was responsible for and the station was not ours, Sir.

* * * * * * *

[fol. 160e] Q. And Mr. Shealy works for whom?

A. Mr. Shealy works for the Southern Engineering Company in Atlanta. He is not an employee of the Blue Ridge [fol. 160f] Electric Co-op. You see, they, Southern Engineering Company is an engineering firm, of course, as the name implies, and they are engineers on this work. They are retained, they receive a retainer fee twelve months a year for doing our engineering and, again I say, Mr. Shealy was their engineer.

* * * * * * *

[fol. 160g] Q. Did Mr. Moss work under you?

A. Mr. Moss is one of our linemen and we have our work broken down. Mr. Green, our line foreman, is in Westminster and Mr. Moss works under him, Sir.

Q. Is Mr. Moss still employed by your company?

A. Yes, sir.

* * * * * * *

[fol. 160i] Q. Are all your projects accepted in writing?

A. Yes, sir. We don't consider them ours until after that acceptance.

Q. Is that acceptance on record?

A. Yes, sir.

* * * * * * *

[fol. 160j] Q. After that old line was accepted, was there any other work done on that old line?

A. After a line is accepted by us, a contractor does no more work on it. No, Sir.

* * * * * * *

[fol. 161] (Mr. Edens publishes deposition of Mr. A. J. Hurt, taken on September 2, 1955, before Rosa McGowan, Notary Public for South Carolina.)

* * * * * * *

[fol. 161a] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION

Civil Action No. 1523

JAMES EARL BYRD, Plaintiff,

v.

BLUE RIDGE ELECTRIC COOPERATIVE, INC., Defendant.

DEPOSITION OF A. J. HURT taken September 2, 1955

* * * * * * *

Mr. A. J. HURT, being duly sworn, testified as follows:

Examination.

By Mr. Hammer:

* * * * * * *

[fol. 161c] Q. Who approved these plans and specifications?

A. Southern Engineering Company with REA.

* * * * * * *

[fol. 161d] Mr. Hammer: I am going to ask that question again, Mr. Walker, so we will have it clear, and if you instruct the witness not to answer, I propose to ask the Court for an order.

Q. Mr. Hurt, do you know what precautions, if any, the Blue Ridge Electric Cooperative takes with reference to the safety of employees of the contractor working on the project?

Mr. Walker: I object because you are getting right back into the same channel which has been asked approximately 15 times or so. Mr. Hurt has stated time and again that the construction was entirely covered and controlled by Bouligny under its contract with Bouligny, and under Blue Ridge contract with Southern Engineering Company. Consequently, you are persisting in asking Mr. Hurt a ques-

tion involving engineering and related matters which he says he is not familiar with.

* * * * * * *

[fol. 162] COLLOQUY

Mr. Walker: I submit that there counsel is not reading testimony that avails anything by way of discovery. Mr. Hurt will testify and if they propose to ask that question to which I objected at the time, then your Honor will rule upon it properly at the time, but certainly my reply is not part of the discovery.

The Court: The only thing Mr. Walker said would be proper to read would be an objection. If it is an objection, you can read it and I will pass on the objection.

Mr. Walker: The witness did not answer, your Honor.

The Court: He did not answer?

Mr. Walker: No, sir.

The Court: He said he didn't answer. He can state his objection later, if any.

Mr. Edens: Your Honor, if they are going to put him up, maybe we will get it then.

The Court: What?

Mr. Edens: I won't pursue it. If they are going to put him up——

The Court: Counsel said they are going to put him up.

[fol. 163] Mr. Walker: Yes, sir.

The Court: The only thing about it is, under one phase of the case, I think probably it ought to be answered now if it is a proper question.

Mr. Edens: It certainly is a proper one.

The Court: No use for me to state what I have reference to in the presence of the jury, but I think I will pass upon the objection now and let him answer it now, if counsel for the plaintiff wishes to pursue that course. If not, you can pursue any course you see fit.

Mr. Edens: I think it would be proper for us to ask your Honor to excuse the jury and put him up and ask him.

The Court: You object to it now, Mr. Walker?

Mr. Walker: Yes, sir, I object to the question.

The Court: I don't see any objection to the question.

Mr. Walker: My objection was based upon the constant repetition, that that question had been asked a number of times and it was repeated—it would be brought back and asked again in a different form, and it would come back time and time again. If they wish to go ahead and ask the question now, Mr. Hurt is here and if your Honor overrules my objection to the question, Mr. Hurt will answer the question. If your Honor rules the question proper——

* * * * * * *

[fol. 166] The Court: All I am concerned with is whether or not the question is competent. If you want to ask the question now, I will put him on in the presence of the jury and let him answer it.

Mr. Edens: We tried for 15 pages before to try to get him to answer it and never got him to answer it and I will be glad to have him answer.

Mr. Walker: Just so there won't be any question, it was pursued in the second hearing and I——

The Court: Counsel's contention, whether right or wrong, is now that he has not directly answered the question, that he's more or less evaded.

Mr. Walker: I just don't want any reluctance interpreted on the part of the witness. I was the person making the objection.

* * * * * * *

[fol. 167] A. J. Hurt, first being duly sworn, testified as follows:

Direct examination.

By Mr. Edens:

Q. Mr. Hurt, do you know what precautions, if any, the Blue Ridge Electric Cooperative took on the project on which Mr. Byrd was injured with refererence to the safety of employees of the contractor working on the project?

A. Mr. Edens, the contract speaks for itself.

The Court: No, no. Answer that question. You are not answering it. I order you to answer the question.

The Witness: I still don't know.
The Court: You don't know?
The Witness: No, sir.
The Court: Read that question again. Read it, Miss Stenographer.

[fol. 168] (The Reporter refers to notes, during which time the following was had:)

The Court: If you don't answer the question, I might adjudge you in contempt of Court and put you in jail.
The Witness: No, sir, Judge, I wouldn't do that.
The Court: I am just warning you.

(Reporter reads the pending question, Lines 14-17, inclusive, Page 167 of this transcript.)

The Witness: I do not know.
The Court: You don't know any precaution he took? Is that your answer?
The Witness: Yes.
The Court: I think that is a fair answer, "I don't know of any precautions he took."

* * * * * * *

[fol. 168a] INTERROGATORIES PROPOUNDED BY APPELLEE AND ANSWERS THERETO GIVEN BY APPELLANT

No. 1

Q. On February 17, 1953, was the defendant engaged in the business of supplying and transmitting electric power use in the Ebenezer Community at or near Walhalla, South Carolina?

A. On February 17, 1953, the defendant was engaged in the business of supplying and transmitting electric power and the Ebenezer Community was one of the communities served.

No. 2

Q. On February 17, 1955, was the defendant the owner of power lines transmitting electricity from its sub-station at Westminster to, and for use in, the Ebenezer Community at or near Walhalla, South Carolina?

[fol. 168b] A. On February 17, 1953, the defendant was the owner of power lines transmitting electricity from its substation at Westminster to, and for use in the Ebenezer Community, but owned only such lines, as were in existence on January 8, 1951.

No. 3

Q. On February 17, 1955, was the defendant in control of power lines transmitting electricity from its substation at Westminster to, and for use in, the Ebenezer Community at or near Walhalla, South Carolina?

A. On February 17, 1953, the defendant was in control of such power lines transmitting electricity from its substation at Westminster to, and for use in the Ebenezer Community as were owned by the defendant and in existence on January 8, 1951.

No. 4

Q. On February 17, 1955, was the defendant in possession of power lines transmitting electricity from its substation at Westminister to, and for use in, the Ebenezer Community at or near Walhalla, South Carolina?

A. On February 17, 1953, the defendant was in possession of such power lines transmitting electricity from its substation at Westminister to, and for use in the Ebenezer Community as were owned by the defendant and in existence on January 8, 1951.

No. 5

Q. Did the defendant engage R. H. Bouligny & Co., Inc., under a written contract, to construct for the defendant a substation on its premises at or near Walhalla, South Carolina?

A. Yes.

* * * * * * *

[fol. 168c] No. 10

Q. Upon completion and acceptance of the substation at Walhalla, South Carolina, were the power lines, constructed and installed by R. H. Bouligny & Co., Inc., con-

necting from the substation at Walhalla, South Carolina to the power lines serving the Ebenezer Community, to be used for the purpose of transmitting electric power from the substation at Walhalla, South Carolina to the [fol. 168d] lines serving the Ebenezer Community?

A. Yes. After completion and acceptance of both the substation at Walhalla and lines leading therefrom.

* * * * * * *

[fol. 180] COLLOQUY

The Court: You can make a motion for directed verdict and failing in that, make a motion for involuntary dismissal. * * *

* * * * * * *

[fol. 182] Mr. Walker: The next ground relates to the Workmen's Compensation law and the position of the defendant with respect to Workmen's compensation. The record shows that the plaintiff has admitted all of the ingredients of the Workmen's Compensation defense except one: those admissions being that the Blue Ridge operated under the Act; that Bouligny operated under the Act; that the plaintiff accepted compensation benefits and received the full benefits provided by law. It is further [fol. 183] admitted that the defendant Blue Ridge did occupy the status of owner under the Act, provided it is shown that the work being performed when this injury occurred constituted a part of the trade, business and occupation of the company.

The Court: As this is stated in this case of Raymond Doane against DuPont. Are you familiar with that?

Mr. Walker: I don't know that I have that.

The Court: January, 1954. "Whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done." Does that state it properly?

Mr. Walker: Would you state that again?

The Court: The only question left open, as I understand it, after the admissions by the plaintiff, is this: I am quoting from the words of this case. "Whether the claimant

was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done." Is that it?

Mr. Walker: Yes, in that respect the testimony shows that the defendant was having this work done by R. H. Bouligny, the employer of the plaintiff. There is no conclusion that could be drawn from the plaintiff's testimony——

The Court: No what?

Mr. Walker: No conclusion could be drawn from the plaintiff's testimony except this: that the plaintiff intended [fol. 184] to show that Blue Ridge was participating and cooperating in this construction. Now, the plaintiff's testimony was intended to show that Ira Moss, the man who died from drowning, was requested to notify the engineer with regard to an inspection. The testimony would show—intended to show—that the defendant Blue Ridge had some responsibility in connection with that substation with regard to the posting of signs, with regard to keeping the gate locked. Everything that the plaintiff would show in that respect points to a duty of performance on the part of Blue Ridge in connection with this particular work being done. Now, we say that if that be the case, then it necessarily follows, particularly with the Statute of which the Court would take notice under which Blue Ridge was incorporated and under which Blue Ridge (a statutory creature) necessarily operated, when that is considered in connection with what the plaintiff intended to show as to what the defendant Blue Ridge did, through its employees at this particular place and this particular substation, then we say that it necessarily follows that the work being done constituted a part of Blue Ridge's trade and business. The two things necessarily go together, your Honor. If Ira Moss was there, if he was doing this work towards cutting off energy or cutting it on, or if he was directed according to the plaintiff to see that the line was inspected, if Blue Ridge had any responsibility in connection with the construction of that substation, in connection with maintain-[fol. 185] ing safety precautions for the construction of that sub-station, then we say it must follow that it constituted a part of our trade and our business. That is what they attempted to show and we say if it is concluded that

they did show what they attempted to show, then it must follow that under the law we are to be considered in the category of the employer under the South Carolina Workmen's Compensation Act. * * *

* * * * * * *

[fol. 188] The Court: What I am going to do—this is a very, very technical point. What I mean is, I can't come to any conclusion about it one way or the other. What I am going to do as to your last ground, I am going to take that under advisement and think about it and see if I can't work it out. Your argument has helped me some but—here's what I have got to decide, that the evidence—what I have got to decide is whether or not the claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person—and that means the Blue Ridge Company, doesn't [fol. 189] it?

Mr. Williams: Yes.

The Court: For whom the work was being done. Must enter directly and become a part of the business. I can't come to any conclusion about it. I will have to take it under advisement.

* * * * * * *

[fol. 194] The Court: What you are saying is this: what they claim was negligence on the part of Blue Ridge, even if it was negligence on the part of Blue Ridge that caused this man's injuries, but when they prove that negligence they also prove that was an operation which entered di- [fol. 195] rectly into and became a part of the business of the person which they were working for?

Mr. Walker: Exactly, your Honor. I wish I could state it as well. That's exactly it and it goes on and that is certainly our position on that particular point.

The Court: Gentlemen, I am going to take the whole thing under advisement. It is a mighty close question. Mighty pretty question. That is a beautiful argument you are making on that thing, Mr. Walker. I congratulate you. You really applied it very efficiently, whether I agree with you or not. I will have to think it over. In the meantime, I will take it under advisement.

* * * * * * *

[fol. 206] Mr. Walker: Your Honor please, it is my understanding that the contract between Blue Ridge and R. H. Bouligny is admitted and we would like to have the contract marked in evidence at this time and there are several sections that I would like to publish.

The Court: Very well.

(Contract received in evidence as Defendant's Exhibit C.)

* * * * * * *

[fol. 206b] EXHIBIT "C"

NOTICE AND INSTRUCTIONS TO BIDDERS

1. Sealed proposals for the construction, including the supply of necessary labor, materials, and equipment except meters, of a rural electric distribution project to be financed pursuant to a Loan Contract between Blue Ridge Electric Cooperative, Inc., Pickens, South Carolina (hereinafter called the "Owner") and the United States of America by the Administrator of the Rural Electrification Administration, dated ....., 19...., and to be known as Project South Carolina—38P—Oconee, which is to be part of the System known as South Carolina—38—Oconee, will be received by the Owner on or before ..... o'clock A.M., Eastern Standard Time, June 19th. 1952, at its office, No. Pickens, South Carolina at which time and place the proposals will be publicly opened and read.

2. The Project will be approximately 24.19 miles in length and 87.69 miles of conversion and located in Oconee, Greenville, Pickens and Anderson Counties, in the State of South Carolina, all as more fully described in the Plans, Specifications, and Construction Drawings therefor hereinafter referred to.

* * * * * * *

[fol. 206c] CONTRACTOR'S PROPOSAL

(Proposal shall be submitted in ink or typewritten)

To: Blue Ridge Electric Cooperative, Inc., Pickens, South Carolina (hereinafter called the "Owner").

1. The undersigned (hereinafter called the "Bidder") hereby proposes to construct the rural electric distribution project South Carolina—38P—Oconee in strict accordance with the Plans, Specifications and Construction Drawings therefor, attached hereto and made a part hereof, and to furnish all materials, machinery, tools, equipment, labor, transportation and other means necessary therefor, for the prices hereinafter stated:

[fol. 206d] CONDITIONS OF ENERGIZATION OF EXISTING LINES UNDER WHICH WORK UNDER SECTIONS H, I, AND N OF CONTRACTOR'S PROPOSAL SHALL BE PERFORMED

LINE SECTION (To be Designated by Point to Point Description on Detail Map)	Hours and Days of Week When Lines Will be De-energized to Permit Line Changes
1. Walhalla Substation Area	9:30 A. M. to 11:30 A. M.
2. Pickens Substation Area	1:30 P. M. to 4:30 P. M.
3. Liberty Substation Area	
4. Cross-Roads Substation Area	Monday thru Saturday
5. Tigerville Substation Area	

The Bidder will so plan and perform its work on the above lines that it will be possible for the Owner to safely re-energize all lines involved at the expiration of the time limits set up in the above schedule to resume service to all consumers being served prior to deenergization. Prior to commencement of work each day on lines to be deenergized, the Bidder will notify the Owner in writing thereof, designating the lines to be deenergized and upon receipt of such notice, the Owner will deenergize such lines. Upon completion of

work each day on such deenergized lines, the Bidder will notify the Owner thereof in writing or in such other manner as the circumstances permit designating the lines to be reenergized and stating that such lines may be safely reenergized and upon receipt of such notice, the Owner will reenergize such lines.

[fol. 206e] DESCRIPTION OF SYSTEM LINE CHANGES AND ASSEMBLY UNITS INVOLVED THEREIN

I. General

The general heading of Line Changes applies to the changing of existing lines or portions thereof from their existing phasing, wire size, and type, to new phasing, wire size, and type, and the removal of existing lines or portions thereof and replacing with new lines in close proximity thereto. In general line changes involve three types of assembly units as follows:

Section H—Conversion assembly units.

Section I—Removal assembly units.

Section N—New construction assembly units on existing lines or on replacing lines.

All bids are to be made on a unit basis so that the Engineer may specify any combination of assembly units that he may deem necessary. Work performed under these sections shall be performed under the special conditions of energization as set forth in the Contractor's proposal.

* * * * * * *

[fol. 206f] CONSTRUCTION AGREEMENT

* * * * * * *

[fol. 206g] ARTICLE II—CONSTRUCTION

* * * * * * *

SEC. 2.—*Supervision and Inspection.*

(*a*) The Contractor shall cause the construction work on the Project to receive constant supervision by a competent superintendent (hereinafter called the "Superintendent")

who shall be present at all times during working hours where construction is being carried on. The Contractor shall also employ, in connection with the construction of the Project, capable, experienced and reliable foremen and such skilled workmen as may be required for the various classes of work to be performed. Directions and instructions given to the Superintendent by the Engineer shall be binding upon the Contractor.

* * * * * * *

[fol. 206h] (*c*) The manner of construction of the Project, and all materials and equipment used therein, shall be subject to the inspection, tests and approval of the Engineer and the Administrator, and the Contractor shall furnish all information required by the Engineer or by the Administrator concerning the nature or source of any materials incorporated or to be incorporated in the Project. The Owner and the Administrator shall have the right to inspect all pay rolls, invoices of materials, and other data and records of the Contractor and of any subcontractor, relevant to the construction of the Project. The Contractor shall provide all reasonable facilities necessary for such inspection and tests and shall maintain an office at the site of the Project, with telephone service where obtainable, and at least one office employee to whom directions and instructions of the Engineer may be delivered. Delivery of such directions or instructions in writing to the employee of the Contractor at such office shall constitute delivery to the Contractor. The Contractor shall have an authorized agent accompany the inspector when final inspection is made and, if requested by the Owner, when any other inspection is made.

(*d*) In the event that the Owner or the Administrator, shall determine that the construction contains or may contain numerous defects, it shall be the duty of the Contractor and the Contractor's surety or sureties to have an inspection made by an engineer approved by the Owner and the Administrator for the purpose of determining the exact nature, extent and location of such defects.

(*e*) The Engineer shall have the authority to suspend the work wholly or in part for such period or periods as the

Engineer may deem necessary due to unsuitable weather or such other conditions as are considered unfavorable for the satisfactory prosecution of the work or because of the failure of the Contractor to comply with any of the provisions of the Contract:

* * * * * * *

[fol. 206i] Article IV—Particular Undertakings of the Contractor

Section 1.—*Protection to Persons and Property.*

The Contractor shall at all times take all reasonable precautions for the safety of employees on the work and of the public, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards shall be guarded in accordance with the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America unless such instructions are incompatible with Federal, State, or Municipal laws or regulations.

The following provisions shall not limit the generality of the above requirements:

(*a*) The Contractor shall at no time and under no circumstances cause or permit any employee of the Contractor to perform any work upon energized lines, or upon poles carrying energized lines, unless otherwise specified in the Notice and Instructions to Bidders.

* * * * * * *

(f) The Project, from the commencement of work to completion, or to such earlier date or dates when the Owner may take possession and control in whole or in part as hereinafter provided shall be under the charge and control of the Contractor and during such period of control by the Contractor all risks in connection with the construction of the Project and the materials to be used therein shall be borne by the Contractor. The Contractor shall make good and fully repair all injuries and damages to the Project or any portion thereof under the control of the Contractor by reason of any act of God or other casualty or cause whether

or not the same shall have occurred by reason of the Contractor's negligence. The Contractor shall hold the Owner harmless from any and all claims for injuries to persons or for damage to property happening by reason of any negligence on the part of the Contractor or any of the Contractor's agents or employees during the control by the Contractor of the Project or any part thereof.

* * * * * * *

[fol. 206j] SEC. 2.—*Delivery of Possession and Control to Owner.*

Upon written request of the Owner approved in writing by the Administrator the Contractor shall deliver to the Owner full possession and control of any section of the Project provided the Contractor shall have been paid at least ninety percent (90%) of the cost of construction of such section. Upon such delivery of the possession and control of any section of the Project to the Owner the risk and obligations of the Contractor as set forth in Article IV, Section 1 (*f*) hereof with respect to such section of the Project so delivered to the Owner shall be terminated: *Provided, However,* That nothing herein contained shall relieve the Contractor of any liability with respect to defective workmanship or materials as contained in Article II, Section 3 hereof.

SEC. 3.—*Energizing the Project.*

* * * * * * *

(*b*) The Owner shall have the right to energize permanently any section or sections of the Project delivered to its possession and control pursuant to the provisions of Section 2 of this Article.

* * * * * * *

[fol. 206k] Article VI—MISCELLANEOUS

SECTION 1.—*Definitions.*

* * * * * * *

(*b*) The term "Engineer" shall mean the engineer employed by the Owner, with the approval of the Administra-

tor, to supervise the construction of the Project, and said Engineer's duly authorized assistants and representatives.

* * * * * * *

[fol. 206l] SEC. 6.—*Franchises and Rights-of-Way.*

The Contractor shall be under no obligation to obtain or assist in obtaining: Any franchises, authorizations, permits or approvals required to be obtained by the Owner from Federal, State, County, Municipal or other authorities; any rights-of-way over private lands; or any agreements between the Owner and third parties with respect to the joint use of poles, crossings, or any other matter incident to the construction and operation of the Project.

* * * * * * *

[fol. 206m] MISCELLANEOUS.

Sufficient safe, cool drinking water and an adequate first-aid kit must be provided on every work truck. Adequate safety equipment and construction tools for the workmen shall be provided by the Contractor.

* * * * * * *

[fol. 215] A. J. HURT, first being duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Hurt, it is in the record, I believe, that you are the manager of Blue Ridge Rural Electric Co-operative, Inc.?

A. Yes, sir.

Q. Is that right, sir?

A. Yes, sir.

Q. And you have been the manager for since about 1939?

A. Yes, sir.

Q. I believe you and I started to work for them at the [fol. 216] same time?

A. Yes, sir.

Q. Mr. Hurt, in what sort of business is the Blue Ridge Rural Electric Co-operative engaged?

A. We are engaged, sir, in serving the rural people in Pickens, Oconee, Anderson and Greenville Counties—parts of those counties, sir—with electricity and we also maintain our own lines; we have our own construction crews and build distribution lines, transmission lines and substations, sir.

Q. So that is the business of the defendant?

A. Yes, sir.

Q. How many miles of line does the Cooperative have at this time in its system?

A. Approximately two thousand miles.

Q. How many members does it have?

A. Has—the tenth of last month—10,816.

Q. How many miles of line did it have when it first started operation back there in 1939 or 1940?

A. I don't recall the exact number, sir, but I think it was around three hundred and something, sir.

Q. Did the Co-op construct that line itself?

A. That was built by the State Rural Electrification Authority.

Q. And transferred to this Co-op?

A. Yes.

Q. And about how many members did the Cooperative have at that time?

[fol. 217] A. I would say between twelve and fifteen hundred, sir.

Q. Does the Cooperative do any construction work with its own employees, Mr. Hurt?

A. Yes, sir, we do, sir. We maintain our own crew of eight linemen and eight groundmen and the metermen, sir, making an outside crew of approximately 16.

Q. What kind of construction is done by the Cooperative's own employees?

A. We do all types of construction. We run third wires for electric ranges and water heaters and we build short extensions. We have built some extensions up to eight miles, but since the end of World War II, we have so many hundreds of people wanting electric service in our rural areas, we have contracted quite a bit of our work, sir.

Q. Do the employees of the Cooperative regularly and continuously carry on construction work?

A. Yes, sir, we are doing construction work——

Mr. Edens: We submit this witness is being led a little too much on that question.

Mr. Williams: All right, sir.

The Court: Go ahead.

The Witness: We do quite a bit of construction work ourselves all the time, yes, sir.

By Mr. Williams:

Q. Has the Cooperative been carrying on that sort of [fol. 218] construction work with its employees from the beginning of its work or not?

A. As far as I know, yes, sir.

The Court: The way to ask that, Senator, is "How long have you been carrying it on?" The way you put it is leading.

By Mr. Williams:

Q. How long has it been carrying on this construction?

A. I would say since the lines were transferred over from the State Rural Electrification Authority and that would be about—I think that was completed in 1940 or 1941, sir.

Q. Does the Cooperative construct substations with its own employees?

A. Yes, sir, we have constructed substations.

Q. Have any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case?

A. Yes, sir, we have built substations of that nature.

Q. Do you recall how many substations the Cooperative has built with its own employees?

A. Yes, sir, we built three.

Q. Is the work which is done by the Cooperative's own employees done under engineering supervision?

A. Yes, sir, we have capable men that do that work and also we get assistance from the leading electrical manufac- [fol. 219] turers and Southern Engineering has been our engineers from the very beginning of our project. We call on them for help, sir.

A. We are engaged, sir, in serving the rural people in Pickens, Oconee, Anderson and Greenville Counties—parts of those counties, sir—with electricity and we also maintain our own lines; we have our own construction crews and build distribution lines, transmission lines and substations, sir.

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Q. Is the work which is done by the Cooperative's own employees done under engineering supervision?

A. Yes, sir, we have capable men that do that work and also we get assistance from the leading electrical manufac- [fol. 219] turers and Southern Engineering has been our engineers from the very beginning of our project. We call on them for help, sir.

Q. Is the work, construction work, done by the employees inspected by an engineer?

A. Yes, sir.

Q. Does the work that is done by the employees have to be up to any special standard?

A. Yes, sir.

Q. What is that standard?

A. It has to meet the requirements of—set forth by the Rural Electrification Administration and those specifications are very rigid, sir.

Q. I believe you have already stated the name of the engineering firm that attended to this work?

A. Yes, sir. Excuse me, your Honor. May I put a cough-drop in my mouth?

The Court: Yes.

Q. What was the name of that firm?

A. Will you repeat that?

Q. Did you answer that question?

A. I asked you to repeat it, sir.

Q. State—do it quickly—the name of the engineering firm that has been used in connection with this work.

A. Southern Engineering Company.

Q. And I believe you have already stated that you have [fol. 220] ten men? Is that right? On construction?

A. Yes, sir, we have approximately sixteen outside men working all the time, sir.

Q. Now, Mr. Hurt, about what part of the time do your outside men spend on maintenance?

A. They spend about a third of their time on maintenance.

Q. And what is the other two-thirds of their time spent on?

A. Two-thirds of the time is on construction, which includes construction of distribution lines and running third wires.

Q. Mr. Hurt, at my request, state whether or not you have examined this contract that has been introduced in evidence, particularly as it relates to types and classes of construction work?

A. Which contract are you referring to?

Q. The one that has been introduced in evidence between Bouligny and Blue Ridge.

A. Yes, sir, I have looked at that contract.

Q. When have you examined it?

A. I have looked at it in the last few weeks, sir.

Q. Had you read the contract or examined it prior to the taking of the deposition?

A. No, sir, I had not, sir.

Q. Based on the examination you made of that contract, I want to ask you this question, please, sir. Is there any sort of construction work called for in that contract which [fol. 221] the employees of the Blue Ridge Electric do not do?

A. Will you repeat that?

Q. In other words, stated differently, do the Blue Ridge Electric Cooperative employees in connection with construction do all of the types and classes of work that was being done under this Bouligny contract?

A. Yes, sir.

Q. Mr. Hurt, while this Bouligny contract was being performed, did the employees of Blue Ridge Electric carry on construction work not covered by the contract? In other words, were your men doing work, construction work, on lines and so on not covered by this contract?

A. Yes, sir, we have been doing practically continuous work, construction work, since the end of World War II.

Q. Mr. Hurt, if the employees of the Cooperative could and did do all the types of work called for in that contract, why was the contract let? Why didn't the employees do it?

A. I would say to expedite matters. We have had several contracts, five or six, let since the end of World War II. Most of our member consumers have been added since the end of the Second World War. Because prior to that time we had just two or three thousand consumers.

Q. When the Cooperative has work done by contractors, do they always provide in the contract that the contractor shall furnish both labor and materials in the past?

[fol. 222] A. Not necessarily, no, sir. Sometimes it is a matter of furnishing labor and material and again they just furnish the labor and the Cooperative furnishes material.

Q. Under the Bouligny contract, and with special reference to the work that was done under that contract, did you superintend any of the work done under the Bouligny contract?

A. No, sir, I did not.

Q. While that construction was going on, did you go out into the field and inspect any of the construction?

A. No, sir, not at all.

Q. That was called for in that contract?

A. No, sir.

OFFERS IN EVIDENCE

Mr. Walker: We wish to offer this, your Honor, and we can mark it now.

(Engineering Service Contract, dated June 30, 1952, between Blue Ridge Electric Cooperative, Inc., and Southern Engineering Company, received in evidence as Defendant's Exhibit D.)

Q. Is that the engineering contract under which the Bouligny work or in connection with which the Bouligny work was done?

A. Yes, sir, that is what it so states, yes.

Q. Mr. Hurt, do you recall when the substation near [fol. 223] Walhalla was completed and turned over to the Cooperative for use?

A. No, sir, I don't recall the exact date but I believe it was in March or February, 1952.

Q. Was it turned over— you have——

Mr. Walker: This letter has been marked for identification by plaintiff's attorneys, your Honor.

Mr. Williams: We hand you that letter, Mr. Hurt.

Mr. Walker: We introduce this, your Honor.

(Letter dated March 19, 1953, Mr. A. J. Hurt, Manager, from R. H. Bouligny, Inc., by E. J. Dale, received in evidence as Defendant's Exhibit E.)

The Court: Proceed.

Mr. Walker: May I look at it?

The Witness: Yes, sir, I recall this letter.

By Mr. Williams:

Q. I believe that letter is dated March 19, 1953?
A. Yes, sir.
Q. And that advised you that this substation had been completed and was ready for energization?
A. Yes, sir.

Mr. Walker: I would like to publish the letter, your Honor.
[fol. 224] The Court: All right, sir.

(Mr. Walker publishes Defendant's Exhibit E.)

By Mr. Williams:

Q. When was the substation energized?
A. On March 19, 1953, sir.
Q. Mr. Hurt, do you of your own knowledge know anything with respect to the facts surrounding the plaintiff's accident at the substation?
A. No, sir, I do not, sir.

* * * * * * *

[fol. 225] Cross examination.

By Mr. Edens:

Q. Mr. Hurt, your deposition was taken in Pickens in your home office?
A. The second one was, yes, sir.

Mr. Walker: The first one was taken at Anderson, Mr. Edens.

By Mr. Edens:

Q. You were asked in Pickens or wherever you were asked, were you asked this question: "Do you have a copy of the contract entered into between Bouligny and Blue Ridge Electrical Co-op?"

[fol. 226] Mr. Walker: May I ask what page he is reading from?
Mr. Edens: Page Six. (To the witness) You said, "Yes, sir." "Where is that contract?" You said, "We have it at

Pickens, Sir." So, this must have been in Anderson. "We have it at Pickens, Sir." "And that is available?" "Yes, sir. I would say it was available." You were asked: "Are you familiar with the terms of the contract?" And your answer was "No, sir."

A. Yes, sir.

Q. And the question was, "Who handles that, sir?" And your answer—did you give this answer? "You couldn't have gotten anybody that knows less about this thing, Mr. Hammer, than A. J. Hurt because my duties are altogether administrative, Sir."

A. That's correct.

Q. That is a correct answer and that is still correct?

A. Yes.

Q. You couldn't find anybody who would know less about this thing than you, about building substations and new lines? That's what the contract with Bouligny related to?

A. At that time. You are reading from the deposition that I took and I will agree that I said that.

Q. Is this still correct or do you want to say that that is not so today? You have learned a lot since that, haven't you?

A. That's exactly right, sir.

[fol. 227] Q. You have been going to school or what have you been doing to get so much sharper?

A. I have looked at the contract, sir.

Q. And I believe you said you all had been building substations ever since you all started this Co-op?

A. That's correct, sir.

Q. I believe you all had built three?

A. Yes, sir.

Q. Who were the engineers on those three?

A. Southern Engineering Company, sir.

Q. The same ones that were on the—that built the substation where Mr. Byrd got his arms burnt off?

A. They were engineers for it, yes, sir.

Q. Same engineers?

A. Yes.

Q. Same set-up?

A. I wouldn't say the same set-up. They checked our work, sir.

Q. They performed the same function in that instance that they performed in the instance of the substation where Mr. Byrd got his arms burned off?

A. If I may explain——

The Court: Answer the question and then you can explain your answer.

(At the direction of the Court, the Reporter read the pending question, Lines 18-20, inclusive, above.)

[fol. 228] The Witness: Yes, sir.

The Court: Now, you can explain that answer, if you wish.

By Mr. Edens:

Q. Do you wish to explain that?

A. That's sufficient, sir.

Q. Who is your electrical engineer?

A. We have one man that has——

The Court: Who is he?

The Witness: Mr. J. M. Porter, sir.

By Mr. Edens:

Q. Mr. J. M. Porter?

A. Yes, sir.

Q. How long have you had him?

A. He has been with us from the very beginning.

Q. Where does he stay?

A. He stays in Pickens. He is our line superintendent, sir.

Q. And he is an electrical engineer?

A. He is not a graduate electrical engineer, no, sir.

Q. I see. He's just titled, kind of like "colonel"?

A. No, he went—if I may explain—he went to Carolina a couple of years and took electrical engineering, sir, and through the years he's gained quite a bit of experience, sir.

Q. Have you checked to see whether or not he has a legal right to call himself an engineer?

A. We have him titled as line superintendent.

The Court: That wasn't his question.

[fol. 229] The Witness: No, sir.

By Mr. Edens:

Q. You know he is not entitled to call himself engineer, don't you?

A. No, sir, I didn't know that, sir.

Q. How many substations do you have?

A. We have six, sir.

* * * * * * *

Q. How long prior to the construction of this substation that Mr. Byrd got his arms burnt off on had it been since a substation had been constructed in behalf of the Blue Ridge or by them?

A. Approximately three years.

Q. Where was that one?

A. That's at Liberty.

Q. At Liberty?

A. Yes, sir, South Carolina.

Q. Who built that?

A. We did, sir.

Q. You built that?

A. Yes, sir.

Q. Three years before?

A. Yes, sir.

[fol. 230] Q. And who was the engineer?

A. Southern, sir.

Q. Southern Construction Company?

A. Southern Engineering Company, sir.

Q. Do you have the contract? Do you have the contract under which you built that?

A. That was under our retainer set-up with them, sir.

Q. With Southern Construction Company?

A. Yes, sir.

Q. You don't have anybody in your organization that are capable of handling the technical aspects of building a substation? You heard the question, didn't you?

A. That's right. No, sir.

Q. Then you are in error in your testimony on direct when you said that the regular employees of the Blue Ridge R.E.A. are qualified to do all types and classes of work that Bouligny Construction Company does?

A. Yes, sir.

Q. You say you have got about nine linemen now?
A. Yes, sir.
Q. Have you added any since Mr. Byrd got hurt?
A. No, sir.
Q. You have got about 2000 miles of line?
A. Approximately that, yes, sir.
Q. Do they all have automobiles to travel in or travel by [fol. 231] plane or what?
A. We have 19 pieces of equipment, yes, sir.
Q. And you say you've got over 10,000 customers?
A. 10,816 as of last month, sir.
Q. That means houses you tapped into, not people in the houses?
A. That's right.
Q. You did testify that you had let five or six contracts since the War to build substations?
A. That's correct.
Q. You meant to say five or six?
A. Yes, sir.
Q. And you got six in all. Then, you built three. That would make nine, wouldn't it?
A. Mr. Edens, you said contracts, sir. And while ago you asked how many substations.
Q. Well, I meant contracts for substations. I am not trying to mislead you.
A. I beg your pardon. I thought you mean general construction as well as substations, sir.
Q. I believe you stated that you had energized a substation in March, the 19th, of 1953; that was also energized on February 17, 1953, when this boy got his arms burnt off, wasn't it?
A. No, sir. The station was turned over to us on March 19, sir.
Q. But it was energized previously when he got burnt?
A. Not to my knowledge, sir.
[fol. 232] Q. Oh, I see. You don't know about that?
A. No, sir, I do not, sir.
Q. You don't know anything about construction of substations or new lines except what you have learned since they took your deposition, do you?
A. Will you ask that again?

Q. You don't know anything about the construction of substations or the construction of new lines except what you have learned since they took your deposition?

A. That's right, sir.

Q. Before they took your deposition, you wouldn't have known the necessary qualifications for a person to have charge of building a substation, would you?

A. Probably so, yes, sir.

Q. You are not certain?

A. Yes, sir.

* * * * * * *

[fol. 330] A. J. HURT, recalled, testified as follows:

Cross examination.

By Mr. Edens:

Q. Did I understand you—I mean, I understood yesterday that you testified you had six substations in the Blue Ridge setup?

A. I think I said five or six, sir, yes, sir.

Q. Is that correct?

A. Yes.

Q. Is it five or six?

A. I would say six, sir.

Q. Will you tell me where they are?

A. They are at Liberty——

Q. Liberty?

A. Yes, sir. Pickens, Tigerville, Walhalla, Westminster and Seneca. That's the six, sir.

Q. Is your Oakway station what you mean by Tigerville? The one at Oakway?

A. I beg your pardon. I would like to change that, sir. If I may, your Honor. We do have a station at Oakway, sir, and that would be seven and Duke Power Company has what we call eliminated our Tigerville substation. That's why it wasn't clear in my mind.

Q. It's still six?

A. It's still six but I would eliminate the Tigerville substation.

[fol. 331] Q. You testified yesterday when you were talking about the facilities that Blue Ridge had, that you had built three substations?

A. Yes, sir.

Q. Do you still stick to that testimony? Do you want to change that now or don't you?

A. We built the original three substations, yes, sir.

Q. Which ones? What you are saying, the original——

A. Yes, sir.

Q. Which were they?

A. They were Liberty, sir, South Carolina; Tigerville; and Westminster, sir.

Q. Didn't you testify yesterday that you built the substation at Liberty three years ago?

A. No, sir.

Q. Am I in error in saying that you testified you built the substation at Liberty three years ago?

Mr. Walker: Your Honor please, I object to the attorney asking the witness whether or not the attorney is in error. He's asked this question; the witness has answered it.

Mr. Edens: I am trying to get the truth.

The Court: He is trying to refresh his memory.

The Witness: If I may say, I said we built a substation at Liberty about three years ago, sir. That's what I said, sir.

[fol. 332] Q. You intended to give the jury and the Court the impression that Blue Ridge themselves built that with their own facilities? Wasn't that the impression you sought to give?

A. The original?

Q. No, the one you built three years ago?

A. No, sir.

Q. You didn't build the one at Liberty, did you?

A. The station there——

Q. Three years ago, you didn't build that substation yourself?

A. No, sir, I didn't intend to give that impression, sir.

Q. Blue Ridge didn't build the original substation; you got it from the State, didn't you?

A. Not to my knowledge, sir.

Q. Did they not have a substation when they took over the line from the State?

A. To my knowledge, the first time I saw it, approximately 15 years ago, there was one transformer there, sir, which I don't consider a substation, sir.

Q. You don't consider a transformer a substation?

A. No, sir.

Q. The substation at Pickens was built by Bouligny?

A. The one there now, sir, yes, sir.

Q. And the substation at Walhalla was built by Bouligny?

A. Yes, sir.

Q. And the substation at Liberty was built by who?

[fol. 333] A. The one there now, sir, I don't know who built it off-hand, sir.

Q. You don't know who built your substation at Liberty?

A. Not right now, I do not, sir.

Q. Would it refresh your recollection to name Sumter Builders? Do you recall now that they built that substation?

A. Since you mentioned it. They did some work for us, sir.

Q. I didn't ask you that. I said, didn't they build your substation at Liberty? You don't know whether they did or not?

A. I would say they did, yes, sir.

* * * * * * *

Q. You didn't build any of the stations that you are operating now?

[fol. 334] A. No, sir, we—no, sir.

* * * * * * *

[fol. 344] EDWARD VINCENT MCMAHON, first being duly sworn, testified as follows:

Direct examination.

By Mr. Walker:

Q. Mr. McMahon, where do you live, sir?

A. Atlanta, Georgia.

Q. And by whom are you employed?

A. Southern Engineering Company.

Q. Would you state your qualifications as an engineer, sir?

A. I have a Bachelor of Science in Electrical Engineering from the Georgia School of Technology or Georgia Institute of Technology. I am a full member of the American Institute of Electrical Engineers. I was chairman of the Georgia Section of Electrical Engineers during the previous year and at the present time I am a member of the executive committee or a director of the Georgia Section of the American Institute of Electrical Engineers. I am a licensed engineer.

[fol. 345] Q. Have you had experience with rural electric co-op work?

A. For the past 17 years, with the exception of four years service with the Signal Corps, I have been engaged in the active practice of electrical engineering with respect to rural electrification.

Q. Do you have knowledge of and work with the business of the defendant, Blue Ridge Rural Electric Co-op?

A. Yes.

Q. For how long have you been doing work with them?

A. For the past nine years.

Q. In what capacity have you worked with Blue Ridge Co-op?

A. As a design and consulting engineer.

Q. And how long have you been doing that type of work with the Blue Ridge Co-op?

A. Ever since getting out of the Army, I have either done it myself or supervised the design of all work that has been done by the Cooperative.

Q. Did the Southern Engineering Company, for whom you state you work, have the engineering contract on this project on which Mr. Byrd was injured?

A. Yes, sir.

Q. Did you yourself work in connection with this project?

A. Yes, sir.

Q. Were you the consulting engineer under that contract on this project?

[fol. 346] A. Yes, sir.

Q. And that relates or does that relate to this contract that Blue Ridge had with Bouligny?

A. Yes, sir, it came first.

Q. Which came first?

A. The engineering service contract.

Q. Now, are you acquainted with any construction work performed by Blue Ridge Co-op through its own employees?

A. Yes, sir.

Q. Is that work similar in type to the work performed by Bouligny under this contract?

A. Yes, sir.

Mr. Edens: If the Court please, the witness should state what the work is. We submit that that is the way the question should be.

The Court: I think so.

Q. Then, Mr. McMahon, with reference to the type of construction work that was done under this Bouligny contract, would you just state what type of construction work was done under that contract?

A. The type of work done by Bouligny under the construction contract consisted of the construction of what we call new construction, the conversion of existing lines, and the moving of existing lines in accordance with the approved design; also, the erection of a small amount of [fol. 347] transmission line and the erection of two substations and one what we call breaker station.

Q. Was the Pickens substation constructed under this Bouligny contract?

A. Yes, sir.

Q. I ask you who prepared the specifications for the construction of the double circuit distribution system that was constructed under the Bouligny contract, leading out of the Pickens substation?

A. Mr. Major Porter, Construction Superintendent of the Blue Ridge Electric Cooperative.

Q. Does the sort of work that was done by Major Porter, about which I just asked you, require special technical knowledge and skill?

A. Yes, sir.

Q. With regard to the types of work that you have mentioned, I will ask you if the types of work mentioned under that contract, performed by Bouligny, if you are acquainted with any construction work of that type performed by Blue Ridge Co-op through its employees?

A. Yes, sir.

Q. Can you state some of the types of work included under that contract that is performed by Blue Ridge Co-op through its employees?

A. Well, the Cooperative is constantly engaged in construction work. They are constantly building new lines to [fol. 348] new consumer members, of various lengths, some short, some long, depending on the circumstances and the location of the consumers with regard to the existing system. They also in many instances find it necessary to "heavy up" as we call it, or increase the load capacity of their existing system to handle power loads.

The Court: Are you talking about the defendant, now?

The Witness: Yes, sir, Blue Ridge Electric Co-op.

The Court: You said the Cooperatives.

The Witness: Pardon me. The construction crews of the Blue Ridge Electric Cooperative are constantly doing construction work. These Blue Ridge Electric Cooperative crews are faced with the problem daily of building new construction to new consumer members, at various distances from the existing line. The Blue Ridge Electric Cooperative also finds it necessary at many times to "heavy up" as we call it, their existing system in order to be able to carry additional power loads that they might develop on their system. The Cooperative also has to maintain their existing transmission system. By that, I mean replacing insulators and stringing in new wire, due to lightening damage or other operating hazards. The Cooperative also finds it necessary to work in their substations resetting breakers, reworking damaged equipment and/or supervis- [fol. 349] ing it, and resetting existing regulators. Is that what you want?

By Mr. Walker:

Q. All right, sir, with regard to the material under this Bouligny contract, for the Walhalla substation, do you know who supplied the material under that Bouligny contract?

A. Yes, sir.

Q. Who did, sir?

A. The Blue Ridge Electric Cooperative purchased and furnished to the——

Mr. Edens: They have a written contract about that. It should speak for what they did instead of this man going back and giving a resume of who bought what. They have got a contract setting out all that.

The Court: The contract is what governs.

Mr. Walker: Yes, sir, and what the witness is saying is supported by the contract.

The Court: Point out in the contract what it is. The contract speaks for itself. It's in evidence, isn't it?

Mr. Walker: Yes, sir. (To the witness) I will ask you this, Mr. McMahon: does the contract provide for purchase of materials?

A. What do you mean by that?

Q. Does the contract provide who shall purchase the material?

A. The contract specifies, or under the terms of the contract, the contractor furnishes all material with the except-
[fol. 350] tions noted, and in the case of this contract, it specifically states that the substation shall be furnished by the owner or the Blue Ridge Electric Cooperative. The two substations and the breaker station.

Q. Do you know under what provision of the contract this line in question that ran from the insulators on the sub on down to the Ebernezer community, do you know under what provision of the contract that line was constructed?

A. Yes, sir.

Q. What section?

A. What we call the "I" section and the "N" section of the contract.

Cross examination.

By Mr. Edens:

Q. The Blue Ridge had nothing to do with the substation and the new construction leading into it until the final acceptance, inspection and acceptance approximately a month after Mr. Byrd got his arms burnt off, didn't it? Under the provision of your contract?

A. Under the provision of the contract governing——

The Court: Is that true or not?

The Witness: Partially true. How do I get out of that?

Mr. Edens: I don't know. You work out the best way [fol. 351] you can.

The Court: Tell what part is true and what is not.

The Witness: The substation wasn't put under the control of the Cooperative until such time as the contractor turned it over to the Cooperative. In the erection of line under the "N" and "I" section of—let's leave "I" section out, because that covers removal of line only. Under the "N" section, the construction periods are controlled by the Cooperative through the terms of the contract and they are, as you say, in the contract and are available if you want them. By that, it is meant that any line constructed in this manner——

Q. I didn't ask you—what does it say?

A. In the contract, sir?

Q. I am not asking you to interpret the contract.

A. No, sir, I wasn't trying to. Under the working conditions set up for the contractor, he controlled the line built under the "N" section and turned it back to the Cooperative in accordance with the outage hours set by the contract.

Q. Until that substation was turned over to the Co-op and accepted by them, the Blue Ridge Co-op wasn't supposed to have anything to do with that substation?

A. That's right, sir.

Q. If a fellow for the Co-op knowingly ran electricity into that substation prior to that time, he would be a tres- [fol. 352] passer, would he not?

A. If the Cooperative man wilfully ran——

Mr. Walker: If your Honor please, counsel has used an expression "trespasser," which has a legal meaning under the law and I object to the question.

The Court: Reframe the question.

Mr. Edens: He would be running electricity in on property where he had no business doing it?

The Witness: If the Co-op——

The Court: Is that true or not?

The Witness: Could he restate the question? With the interruption, I have lost the track.

(At the direction of the Court, the Reporter read the pending questions, Lines 24-25, inclusive, Page 351, and Line 1, above; Lines 7-8, inclusive, above.)

The Witness: Yes, sir.

* * * * * * *

DEFENDANT RESTS

Mr. Walker: The defendant rests, your Honor.

The Court: Anything in reply?

Mr. Edens: We have a motion, your Honor.

The Court: Gentlemen, go to your jury room. (Jury retires.)

[fol. 353] PLAINTIFF'S MOTION TO STRIKE

Mr. Hammer: If the Court please, at this time we move to strike the affirmative defense interposed by the defendant with respect to those allegations that the plaintiff is excluded or precluded from bringing this action, by reason of the fact that he was engaged in work which is part of the trade, business and occupation of the defendant, within the meaning of the Workmen's Compensation Act, for the reason that it has been conclusively demonstrated that the defendant is not engaged in the business of constructing substations; and the business of Bouligny was one for the construction of substations and under the provisions of the Act under which the defendant was incorporated, it was engaged in the business of supplying and distributing electricity.

* * * * * * *

[fol. 354] The Court: In the event I overrule your motion, do you contemplate putting up any testimony in reply? You have that right, of course. On this point, I mean.

Mr. Hammer: We haven't discussed it, but we are making that motion. I frankly don't know at this point of any reply that is necessary. I don't know of any evidence in this case——

[fol. 355] The Court: I am inclined to think so far it is a question of law but I will hear from Mr. Walker on that.

I don't know of any issue of fact to submit to the jury. It seems to me under the testimony here there has been—I don't know of any conflict in the testimony, so far as that's concerned, so far.

Mr. Hammer: I listened carefully to the last witness, and——

The Court: Do you agree with that, Mr. Walker, that that is a question of law?

Mr. Walker: I think it is a question of law because there has been no evidence presented by the plaintiff to dispute the position.

The Court: The reason I am making that inquiry as to whether you intend to put up any more testimony in the event I overrule your motion, counsel may wish to move for a directed verdict on that ground since it is a question of law. But that is his prerogative after all the evidence is in. Of course, he can't move for a directed verdict as long as you have a right to reply.

Mr. Hammer: We are moving at this time in the nature of a voluntary dismissal.

The Court: You move to dismiss that defense?

Mr. Hammer: Yes, sir, at this stage of the game.

The Court: What do you say, Mr. Walker?

Mr. Walker: Your Honor please, we say that the evidence could not be more clear, that the defendant co-op was in the business that is covered by this contract; that is, the work that was being performed.

The Court: Let me see. You call it "co-op" but the de-[fol. 356] fendant I am talking about the defendant in this case, it seems to me that the business they engage in is selling electricity. They are not in the contracting business. They don't go build substations for Gaffney, Newberry and somebody else, do they?

Mr. Walker: But they are in the business constructing the identical things that were being constructed under this contract.

The Court: If that were true, there wouldn't be any such—in other words, if a main part of his line was broken down or something like that or a substation blew up by lightening and he went and fixed it, you say he's in the contracting business, building plants for people?

Mr. Walker: The defendant is in the business of building lines.

The Court: For itself?

Mr. Walker: Yes, sir. And this project, this thing that Bouligny was doing was for the defendant. The defendant is in the same business of doing for himself what Bouligny was doing for him. It is authorized by statute. It was a necessarily integral part of his business and the testimony shows that the defendant regularly did, performed, engaged in the things that were being constructed under the contract.

The Court: After Mr.—the gentleman—corrected his testimony, how many substations have they built?

Mr. Walker: They have built three, your Honor.

The Court: I understood he changed his testimony, that they had not built three.

Mr. Walker: Yes, sir, they have built three all told. I am certain they have built three. One of those, as I under-[fol. 357] stand has been subsequently replaced, but still they have built three.

The Court: What bothers me about your defense is: what is the business of these people? The business of these people is selling electricity. They are not contractors to build substations.

Mr. Walker: Their business is that which is declared by the statute and they do all things that is so declared by the statute. The special statute——

The Court: If they fix a plumbing fixture in their toilet, would you say they are engaged in the plumbing business?

Mr. Walker: No, sir, and I do not say they are engaged in the private contracting business.

The Court: If they build a bathroom and put plumbing fixtures in it, would you say they are engaged in the plumbing business?

Mr. Walker: No, sir.

The Court: It is necessary for their men to use that bathroom.

Mr. Williams: But that is remote from the business itself.

Mr. Walker: I say here that the defendant is engaged in the things that were being done in this instance for the

defendant under a contract, and the Statute so authorizes them to engage in it and the testimony shows that they regularly engaged in it.

In regard to the authorities, let's take the Duke Power Company case, Marchbanks v. Duke Power. In that case, the independent contractor was painting poles. Now, the Duke Power Company is not engaged in the painting contracting business. Let's go from there and take the Berry v. Greyhound case. There a greyhound bus went into a [fol. 358] garage. The Greyhound Company is not in the garage business insofar as privately, or in the garage contracting business.

The Court: If they were engaged in that business, why did they go to Charlotte and hire this contractor? If they were engaged in that business, they would have done it themselves. Instead of that, they go to Charlotte and get a contractor not only to build this substation but to build others in the past.

Mr. Walker: He testified they did it to expedite the work. Insofar as expediting the business.

The Court: According to your own testimony, you say they only built three and that is half of them. They owned six or seven?

Mr. Walker: They have six, yes, sir.

The Court: According to you they built half of their substations.

Mr. Walker: I believe one of those three has been subsequently replaced, but still they are in the business. Let's go one step further. Let's go back to what the plaintiff has contended insofar as all this case is concerned——

The Court: "Engaged in the business." I have considered your cases; I have considered your argument on them. My idea of engaging in the business is to do something for somebody else. What they are doing—and everything they do about repairing lines and building substations, they do it for themselves. To engage in the business is doing something for somebody else. How can you do business with yourself?

Mr. Walker: I don't think that is the interpretation that——

[fol. 359] The Court: In other words, everything that they do, according to your argument, they engage in that business. If you take the extreme, as I said about the plumbing, if they go built a toilet, they are engaged in the plumbing business. If they build a heating plant for one of their storerooms, they are engaged in the heating business.

Mr. Walker: We are necessarily confined to and referring to the types of construction being performed by Bouligny under the particular contract and we say that the defendant was engaged in the same types of construction that were provided for under that contract.

RULING OF THE COURT

The Court: I can't follow you on that. Anything else you have to say, gentlemen? I will have to grant the motion. I allow you an exception. Bring in the jury.

(12:55 p.m., Jury returns to open Court.)

The Court: Anything in reply?
Mr. Edens: Nothing, your Honor.

* * * * * * *

[fol. 360] DEFENDANT'S MOTION FOR DIRECTED VERDICT, ETC.

The Court: I will allow you to include in that Motion for Directed Verdict your defense which I have stricken, if you desire. In other words, I will allow you to include a motion for directed verdict on the ground that all the testimony shows whatever you want to put in it. In other words, you can add that to it, to reserve your rights. Of course, you could make it on the other. I will allow you to make it if you want to.

Mr. Walker: Yes, sir. I do so desire to make a motion for directed verdict. First, for the record, I wish to include—

The Court: The same grounds you made the motion for involuntary dismissal?

Mr. Walker: All those grounds.

* * * * * * *

[fol. 361] Mr. Walker: Next, we move for a directed verdict upon the grounds that the admissions show, first, that the defendant operated under the Workmen's Compensation law of South Carolina; that the employer of the plaintiff, Bouligny, operated under the Workmen's Compensation law of South Carolina; that the plaintiff accepted from his employer full benefits under the Workmen's Compensation law of South Carolina; and that under the circumstances and as plead in the Answer of the defendant, that the acceptance of the Workmen's compensation by the plaintiff and the full benefit from his employer, since the work being done was directly connected with and constituted a part of the trade, business and occupation of the defendant, that the plaintiff is barred from seeking a recovery from this defendant at common law;

(when ?)

upon the further ground that while the claimant-plaintiff was injured he was engaged in an operation that entered directly into and became a part of the business of the defendant for whom the work was being done; further upon the grounds that when the plaintiff in this case, if he proves or if he has proved any negligence on the part of the defendant, even if it was negligence on the part of [fol. 362] Blue Ridge that caused this man's injuries, when the plaintiff proves that negligence, he necessarily and it must follow that it was—and they have proved, an operation that entered directly into and became a part of the business of the defendant for whom the work was being done.

Now, supplementing that, we have here a contract that called for particular work, as specified in the contract to be done by Bouligny for the defendant. That contract contained different types of work. The evidence in this case conclusively shows and it is undisputed that the——

The Court: You are re-arguing the case now. I just want you to state your grounds. Go ahead. You might consider this as a ground. Undisputed evidence shows what?

Mr. Walker: The undisputed evidence shows that the defendant was engaged in work that is similar in type to the work that was being performed by Bouligny under this contract and which work constituted a part of the trade,

the business and occupation of the defendant; and, supplementing that, that such work which was being performed under this contract, and which I have just stated constituted a part of the trade, business, of the defendant and which the defendant was regularly engaged in, constituted a part of the work which the defendant was authorized to do by special statute, which is included as a part of its powers under the particular statute and which it had the right under the law to engage in and did engage in.

* * * * * * * *

[fol. 364] RULING OF THE COURT

The Court: Very well. Well, I will overrule the motion for a directed verdict. Bring in the jury.

[fol. 365] ARGUMENT AND SUBMISSION—June 7, 1956
(omitted in printing)

[fol. 366] IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7183.

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Appellant,

v.

JAMES EARL BYRD, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT ANDERSON.

(Argued June 7, 1956. Decided October 1, 1956.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and MOORE, District Judge.

Ray R. Williams, and Wesley M. Walker (Leatherwood, Walker, Todd & Mann, and Williams & Henry on brief) for Appellant, and Henry Hammer (Henry H. Edens and William E. Chandler, Jr., on brief) for Appellee.

[fol. 367] OPINION—October 1, 1956

SOPER, Circuit Judge:

James Earl Byrd, an electric lineman in the employ of R. H. Bouligny, Inc., a construction company, lost both forearms on February 17, 1953, when he accidentally came in contact with a live wire while working on a construction project of Blue Ridge Rural Electric Cooperative, Inc., which was engaged in the distribution of electricity in rural areas. Byrd filed a claim against his employer under the Workmen's Compensation Act of South Carolina and collected full benefits. He then brought the present suit against the Cooperative claiming that the accident was due, at least in part, to its negligence. Blue Ridge defended on the grounds (1) that the accident was not due to its negligence but to the negligence of Bouligny and the contributory negligence of Byrd, and (2) that even if Blue Ridge were negligent, Byrd's only remedy was afforded by the Compensation Act since the work being done by the contractor was part of the business of the Cooperative. The District Judge rejected the contention that the liability of the Cooperative was confined to the payment of compensation and submitted the negligence questions to the jury, which found a verdict for the plaintiff in the sum of $126,786.80, and the defendant appealed.

Blue Ridge Rural Electric Cooperative was organized as a rural electric cooperative in 1939 under the provisions of the Rural Electric Cooperative Act of South Carolina, Chapter 15 of the South Carolina Code of 1952. Section 12-1021 of this statute authorizes the organization of cooperative nonprofit membership corporations for the pur-

pose of supplying electric energy and extending its use in rural areas; and §12-1025 empowers a cooperative to generate, accumulate and distribute electric energy in rural [fol. 368] areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment, and any and all kinds of property which may be necessary or convenient to accomplish the purposes for which the corporation is organized.

Acting under this statute, Blue Ridge has engaged in supplying electricity to the rural people of four counties in South Carolina, and in the construction and maintenance of distribution lines, transmission lines and substations. The system was begun by the State Rural Electrification Authority, and comprised 300 miles of line serving 1100 consumers when it was taken over by Blue Ridge in 1939. Since then it has steadily grown until at the time of the trial in the District Court in 1955, it had 2000 miles of line and 10,816 consumers or members.

On June 23, 1952, Blue Ridge let a contract to Bouligny in order to expedite its construction work. It had secured a government loan under a loan agreement approved by the Rural Electrification Administration, acting by the Administrator, and the construction contract was executed in conformity with the provisions of the loan agreement. The contract called for the construction of approximately 24.2 miles of new electric transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two appurtenant substations and a breaker station.

The accident in this case happened at one of the substations, known as Walhalla, when the lineman came in contact with a live wire on a line which the contractor was converting from a one-phase or one-wire line to a two-phase or two-wire line. It served the residents of a rural section [fol. 369] known as the Ebenezer Community and was connected at a right angle with a transmission line on a highway at a point about 1250 feet from the Walhalla station.

The conversion required the relocation of a portion of the Ebenezer line where it left the highway, and the running of a new line from the new connecting point to the substation; and meanwhile it was necessary to do the work in

such a manner as to continue the service to the Ebenezer Community as far as it was possible to do so. The construction contract expressly provided in this respect that at the beginning of each day the contractor would notify the owner of the lines to be de-energized and at the end of each day the contractor would notify the owner of the lines to be re-energized, and that in each instance the owner would take the necessary steps to comply with the notice.

On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days. The wires running from it to the new connecting point on the Ebenezer line were also in place and one of them received current from another source and was used to service the community. It was brought from the connecting point to a double-end pole located within the fenced area of the substation at a distance of seventy-five feet, and ran thence to the substation itself. It was intended that the current should not run to the substation but should be cut off at the pole by postponing the installation of a connecting device thereon, known as a jumper, until the substation was completed. Unfortunately, through a mistake of a foreman of the contractor, a permanent closed jumper was placed on the pole and a foreman of the owner was notified that it was safe to energize the line, and he did so without inspecting [fol. 370] the line himself. An examination would have shown that the current would run through to the substation. In this situation another foreman of the contractor, who also failed to inspect the line, took the plaintiff lineman to the substation and directed him to make a connection between the line outside and the equipment inside the substation, and the lineman in attempting to do so caught hold of the live wire, believing it to be dead, and was burned.

That the accident was caused primarily by the negligence of employees of the Bouligny company, which is not a party to the instant suit, was abundantly proved and is not in dispute, and on this account Blue Ridge, the defendant company, contends that it should be exonerated. It has been noted above, however, that the construction contract imposed upon Blue Ridge alone, the duty of putting on and cutting off the current during the course of the work when

notified by the contractor; and there was additional evidence offered by a qualified electrical engineer that standard safety procedure in electrical work requires that a person who is responsible for letting power into existing lines to which new lines are connected, must personally inspect the connection before energizing the old lines. Because of this evidence, the issue of negligence on the part of Blue Ridge was submitted to the jury.

Blue Ridge also defended on the ground that recovery was precluded by contributory negligence on the part of the lineman who could have readily seen the permanent bond on the double-end pole only seventy-five feet away, if he had taken the pains to trace the wire from the substation to the pole. The evidence, however, showed not only that he was acting under the orders of his superior when he was hurt, but that he relied on the standard safety regulation that a [fol. 371] new construction built by a contractor must not be energized until it has been inspected, approved and turned over to the owner. Accordingly, the issue of contributory negligence was also submitted to the jury.

We do not question the submission of the issue of contributory negligence to the jury under these circumstances. The sufficiency of the evidence to show negligence on the part of the Cooperative is, however, not free from doubt, but it is not necessary to decide this point in view of the basic defense that the lineman's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of Carolina, Title 72 of the South Carolina Code of 1952. That statute provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the execution of the whole or any part thereof, the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him. §72-111.

When a contractor agrees to do work for another person which is not a part of the trade or business of the other person and contracts with a subcontractor to do the whole or part of the work, the contractor becomes liable to pay compensation to the workmen of the subcontractor. §72-112.

A like provision for the protection of the workmen of a sub-subcontractor is made in §72-113. When a principal contractor* is liable to pay compensation under these sections, he is entitled to indemnity from any person who would have [fol. 372] been liable to pay compensation independently of the sections. §72-115. A workman may recover compensation from the subcontractor instead of from the principal contractor, but not from both. §72-116. Every employer who accepts the compensation provisions of the Act is required to secure the payment thereof by insurance or otherwise. §§72-401 *et seq.*

The rights and remedies granted by the statute to an employee exclude all other rights and remedies of the employee as against his employer at common law or otherwise, on account of injury, §72-121; and the acceptance of an award under the statute or the procurement and collection of a judgment in an action at law is a bar to proceeding further with the alternate remedy. §72-123.

It was conceded in the Court below that both Blue Ridge, the owner, and Bouligny, the contractor had complied with and were operating under the Compensation Act, and that after the injury the lineman had elected to receive and had accepted full benefits thereunder from Bouligny; and it was also conceded that if the work being done at the time of the injury constituted a part of the business of the cooperative, the present suit must fail. The burden of the appellee's argument rests on the assertion that the construction work done by Blue Ridge itself was limited to everyday operations of hooking up connections for customers and did not include extensive line construction, and in view of the fact that the lineman was hurt while attempting to connect the substation with the new line, it is contended with especial emphasis that the construction of the substation was not part of the business of the Cooperative.

The uncontradicted evidence as to the construction work [fol. 373] done by the employees of Blue Ridge may be summarized as follows: It maintains an outside crew of 8

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* It was said in *Marchbanks* v. *Duke Power Co.*, 190 S.C. 336, 362 that the term "principal subcontractor" is synonymous with owner.

linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It constantly builds new lines to new consumer members and builds extensions, some short and some long, up to eight miles in length; but since the end of World War II so many persons in rural areas have demanded electrical service that it has employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. All of the construction work, whether done by itself or by outside contractors, is done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which is employed by Blue Ridge to make sure that the system complies with the requirements of the Rural Electrification Administration of the United States.

The testimony with respect to the construction of the substations of Blue Ridge, stated most favorably to the appellee, discloses that originally Blue Ridge built three substations with its own facilities, but that all of the substations which were built after the war, including the six it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident it had no one in its direct employ capable of handling the technical detail of substation construction.

There can be no doubt that all of the work covered by the Bouligny contract was of the class which Blue Ridge was empowered by its charter to perform and that all of it was necessary to enable it to serve the growing needs of the rural communities. Furthermore, the main actor in the whole enterprise was the Cooperative itself. This is seen [fol. 374] the more clearly when we round out, by way of illustration, the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Blue Ridge secured a loan of $334,300.00 from the United States under the Rural Electrification Act of 1934, as amended, to finance the construction work above described, the lines to be located along such routes as the owner with the approval of the Administrator should designate. Blue Ridge then entered into an engineering service contract with the Southern Engineering Company, whereby the Engineer agreed to render the engineer-

ing services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the Engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the Engineer after the procuring of rights of way and easements by the owner, and the supervision by the Engineer of all the details of the construction work as the representative of the owner.

The construction contract with Bouligny conformed to the requirements of the loan agreement. It defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the substations [fol. 375] were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work.

From this description there can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and substations necessary for the distribution of the product, if these words are given their ordinary significance. The appellee says, however, that in the meaning of the compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employees; and reliance is placed on the evidence that since the war Blue Ridge has sublet the construction of substations to outside contractors, and the line work performed by its own employees has been limited in extent. We do not think this interpretation of the statute is tenable. It will be noticed in the first place that §72-111 makes specific

provision for the performance by a contractor of work which is part of the owner's business and in such case imposes upon the owner the same liability to pay compensation to the contractor's workmen as if they were immediately employed by him. In other words, the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In consequence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection.

[fol. 376] The decisions of the Supreme Court of South Carolina are in accord with these views. Very similar was the case of *Marchbanks* v. *Duke Power Co.*, 190 S.C. 336, where the power company, like Blue Ridge, was in the business of distributing electricity which from time to time required the erection of poles and transmission lines. In carrying out this purpose, it contracted with an outsider to paint 170 metal poles, and one of his workmen was injured while doing the work and sued the power company in an action of tort. It was held that the suit could not be maintained, and that the worker's only remedy was under the Compensation Statute which relieved the power company of common Law Liability. Circuit Judge Oxner, now a Justice of the Supreme Court of the State, whose opinion was set out in full and approved by that Court, described the purpose of the Act in these words, 190 S.C. 343, 344:

> "It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was a part of his trade or business by permitting such owner to sublet or subcontract some part of said work. Doubtless in many instances such contractors would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such con-

tractors would not be required under the Act to carry compensation insurance. It was therefore, provided under the first paragraph that where such work in which the employee was engaged was part of the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not."

[fol. 377] A like result was reached in *Bozeman* v. *Pacific Mills*, 193 S.C. 479, where, in the execution of a contract between the owner of the mill and an independent contractor for the painting of a water tank maintained by the mill for fire protection, an employee of the contractor was killed by the unexplained explosion of the tank. A claim against the mill for Workmen's Compensation was resisted on the ground that the workman was not an employee of the mill and that the painting of the tank was not part of its trade or business, because the work was of such dangerous and unusual character that it was never done by the regular employees of the mill but was always let out by contract to an experienced steeplejack. In overruling this contention, the Court said: (p. 483)

"The testimony was to the effect that the mill furnished all the paint, the ladders and any lumber or scaffolding necessary to do the work. As already seen, the contract itself contained a postscript that 'the above work is all subject to inspection and approval by representatives of Pacific Mills.' The tank was an integral part of the mill business. There was also testimony to the effect that the mill desired that the work on the inside of the tank be completed as soon as possible so that its everyday, ordinary service, that of fire protection, could be resumed, it being shown that the mill depended upon this tank for such protection. The very nature of the work done by the mill, that of the manufacture of cotton into cloth, especially required the best of protection against fire. Hence this tank was particularly necessary and essential in the operation and carrying on of the business of the mill. It, therefore, follows

> that the painting of the tank was such a part of the trade, business or occupation of the Pacific Mills as [fol. 378] would constitute Martin a subcontractor, and thus render the mill liable to the beneficiary of Boseman for payment of compensation." *

The appellee seeks to distinguish some of these cases on the ground that in them the injured man was engaged in maintenance work ordinarily performed by the employees of the owner in the operation of the business; but it is manifest that it would defeat the purpose of the Act to make the prime mover of an enterprise liable to pay compensation for injuries suffered in the work of maintenance or repair, whether he is negligent or not, but to exempt him in the more important and more extensive field of new construction. For the same reason, it cannot be held that an owner is not obliged to provide compensation for injuries incurred in the course of construction work performed on his behalf as part of his business, if he customarily lets the work out to independent contractors and does not perform it himself. It will have been noticed that §72-111 of the Act expressly covers an owner who undertakes to perform any work which is part of his business and contracts with any other person for the execution "*of the whole or any part of the work*". Thus, the statute recognizes that work done at the behest of the owner is owner's work; and unless he is held liable to pay compensation for injuries incurred in its progress the underlying purpose of the Act will be frustrated. [fol. 379] The quotation from *Boseman* v. *Pacific Mills* set out above is particularly pertinent in this connection, as are also the decisions in *Parkable* v. *Greenland Oil Co.*, 122

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* For other South Carolina cases in which the owner was found liable for compensation to injured employees of subcontractors, see *Kennerly* v. *Ocmulgee Lumber Co.*, 206 S.C. 481, where the owner of a sawmill let a contract for cutting timber on its own lands under its supervision; *Hopkins* v. *Darlington Veneer Co.*, 208 S.C. 307, where the owner of the plant subcontracted the cutting of timber on its lands; *Smith* v. *Fulmer*, 198 S.C. 91, where a bridge builder sublet the making of fills and the laying of pavement to a subcontractor. See also the decisions of this Court in *Doane* v. *E. I. du Pont de Nemours & Co.*, 209 F.2d 921; *Berry* v. *Atlantic Greyhound Lines*, 114 F.2d 255.

Kan. 720 and *Wisinger* v. *White Oil Co.*, 5 Cir., 24 F.2d 101, cited with approval in *Fairchilds* v. *Duke Power Co.*, *supra*. As was said in that case, 190 S.C. 363:

> "It is the clear purpose of the Act to make the owner, the person interested in having the work done, liable to the employee so injured."

It cannot be denied that Blue Ridge was vitally concerned in the construction of the equipment covered by the Bouligny contract, without which the distribution of its product would have been impossible.

The cases on which the appellee relies are distinguishable on the ground that the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged. Thus, in *Miles* v. *W. Va. Pulp and Paper Co.*, 212 S.C. 424, the owner of a pulpwood plant engaged a contractor to supply him with pulpwood on a commission basis; in *Benbow* v. *Edmunds High School*, 220 S.C. 363, the school authorities employed an electrical contractor to repair a lighting fixture in a high school; in *Horrell* v. *Gulf & Valley Oil Co.*, 15 La. App. 603, a contractor was employed to install a furnace in an oil refinery; in *Packett* v. *Moretown Creamery Co.*, 91 Vt. 97, a contractor was employed to erect a building for a creamery; and in our decision in *Sears Roebuck & Co.*, 172 F. 2d 802, a corporation engaged in the sale of goods contracted with a builder to make certain alterations in a storage warehouse. In *Glidden Rural Elec. Cooperative* v. *Iowa Employment Security Commission*, 236 Iowa 910, the co-[fol. 380] operative was successful in resisting an assessment for unemployment compensation tax on the grounds that it had never had as many as 8 employees and, although it had let contracts for the construction of lines, it had never engaged in the construction work except to make service connections, and hence the Court held that the work done by the contractor was not a part of the *usual* trade or business of the cooperative within the terms of the statute.

We conclude that the work performed by Bouligny under the contract was done in carrying on the trade or business of the Cooperative.

In the District Court the plaintiff conceded that he had no case if the work in which he was engaged when he was injured was part of the trade or business of Blue Ridge. He now contends however, in the alternative, that even if the work was of this character he is not precluded from bringing the present action because Bouligny paid the compensation award and hence the acceptance of the award does not bar his suit under the provisions of §72-123 of the statute. Although the point is now raised for the first time we, nevertheless, consider it since it goes to the heart of the defense and the parties have discussed *in* in the briefs of this appeal.

The contention in our opinion cannot be sustained. It involves the erroneous assumption that although the statute imposes an absolute liability upon the owner of the business to provide compensation, usually effected by carrying insurance for the employees of the independent contractor, the owner loses the offsetting benefit of immunity from suit at law provided by the statute, if the injured workman elects to receive compensation from the contractor. It is generally held under statutes of this kind that both the owner of the [fol. 381] business and his independent contractor, or the principal contractor and his subcontractor where they are the parties concerned, are exempt from suit. A leading case on the subject is *State* v. *Bennett Bldg. Co.*, 154 Md. 159, where the building company was sued in an action at law for the death of an employee of a subcontractor who had undertaken to lay tile floors in a building under construction. Prior to the institution of the suit an award of compensation under the Maryland compensation statute had been paid by the subcontractor. The Maryland statute like that of South Carolina provides that where a principal contractor undertakes under contract the execution of any work in the way of his trade or business and contracts with any other party as subcontractor for the execution of the whole or any part of the work, the principal contractor shall be liable to pay any workmen employed in the execution of the work any compensation under the Act which he would have been liable to pay if the workmen had been immediately employed by him. In considering the effect of

the statute and sustaining the defense that the principal contractor was exempt from suit at law the Court said: (154 Md. 162-163, 165, 167-168)

* * * "The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor, when he was not in law the employer of the injured workman. The result then is that where the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work. This absolute statutory liability is not affected by the fact that it is later provided, in section 62, that the workman may elect whether he shall enforce the compensation against the principal contractor [fol. 382] or the subcontractor; or that, whenever an employee proceeds against the principal contractor, the latter shall have the right to join the subcontractor or any intermediate contractor as defendant or codefendant in the case; or that, when the principal contractor is liable to pay compensation pursuant to this section, he shall be entitled to indemnity from any employer who would have been liable to pay compensation to the employee independently of section 62. These provisions leave unimpaired the primary liability imposed by the statute upon the principal contractor. The first gives to the workman the choice of two primary liabilities, as but one is enforceable by him. The second is a matter of procedure, and the third relates to the question of indemnity to the principal contractor by the subcontractor, and neither concerns the liability of the principal contractor to the workman. This primary liability, so imposed by statute upon the principal contractor, is not based upon contract, since the legislation is predicated upon the fact that no contractual relation, as master and servant, exists between the principal contractor and the workman; nor does it flow from a breach of duty, because the liability arises independently of the existence of fault on the part of the principal contractor. This legislation, however, finds its constitutional

support in the consideration that the general welfare is promoted and conserved by requiring the employer and the workman to yield something of their respective rights toward the establishment of a principle and plan of compensation for their mutual protection and advantage."

* * * "It may be said that there were two employers of the dead man. One was his immediate employer, the subcontractor, whose relation was founded in contract: [fol. 383] and the second was his more remote statutory employer, the principal contractor, whose status, with the rights and liabilities growing thereout, was created and determined by law."

* * * "If the construction by the appellant prevail, the dependent may recover compensation of the subcontractor, and also damages at common law against the negligent principal contractor, who is thus taken out of the act, by the dependent's choosing to file her claim against the subcontractor, but who would remain within the act, if she should file her claim for compensation against the principal contractor. In short, the liability of the principal contractor would not be fixed and determined by law, but by the arbitrary exercise of the dependent's will. The result of this contention would be to impose upon the general contractor an onerous and dual liability for compensation or damages, at the election of the employees of a subcontractor, while limiting his liability to his own immediate workmen to compensation alone. This theory would deprive a class of employers within the act of their exemption from all liability save that of compensation, which is an essential part of the general legislative plan. A construction so antagonistic to the fundamental principles underlying the enactment will not be adopted. If an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary."

The importance of this case for our purposes is seen by the approval given the decision in *Marchbanks* v. *Duke Power Co.* where, as in the pending case, the plaintiff claimed not only that the work being done was not part of [fol. 384] the defendant's business but also that the remedy afforded by the Compensation Act was not exclusive. The Court said: (190 S.C. 351-352)

> "I now come to plaintiff's third and last contention to the effect that his remedy under the Compensation Act is not exclusive. Most of the cases cited as sustaining this contention involve acts which are materially different from that in force in this State in that no direct liability is imposed upon the principal or owner. These acts require such owner or principal to see that the contractor carries compensation insurance for the protection of his employees and only in instances where he fails to do this does liability on his part arise.
>
> "The best reasoned case that I have found on this question is that of *State* v. *Benjamin F. Bennett Bldg. Co.*, 154 Md., 159, 140 A., 52, 53. It involves an act similar in principle to that of this State."

The Court then quoted extensively from the decision of the Maryland Court.

In opposition, the appellee calls attention to the unreported decision of the District Court of the United States for the Eastern District of South Carolina in *Ballard Admx.* v. *Southern Oil Co.* and the decision in *Younginer* v. *J. A. Jones Const. Co.*, 215 S.C. 135. In the *Ballard* case it was held that an action at law would lie against the owner of a building for the death of a workman who was killed while working on the wall of a building for the owner as an employee of an independent contractor, although his estate had recovered compensation from his immediate employer. The decision was based on the theory that §72-111 of the South Carolina Compensation Act imposes liability on an [fol. 385] owner to provide compensation only when the contractor fails to provide coverage. We find it impossible to follow this decision since it seems to us to be in direct conflict with the decision of the Supreme Court of South

Carolina in *Marchbanks* v. *Duke Power Co.* and the cases cited therein.

The decision in *Younginer* v. *J. A. Jones Const. Co.* is relied upon because the Court in its opinion described the liability imposed upon the principal contractor by §72-111 as secondary in nature; and this is taken by the appellee to mean that the principal contractor is only a guarantor and his liability to provide compensation arises only when the subcontractor fails to do so. We do not think that this interpretation of the language can be sustained. A claim for compensation was filed in the cited case by an injured man against his immediate employer under the South Carolina Act for an injury incurred in doing work outside the State: and it was necessary for the claimant to show that the contract of employment was made inside the State. For this purpose he relied on a previous contract of employment in the State between him and a subcontractor of the respondent which had been completely performed. The Court pointed out that the work in South Carolina and the claimant's employment therein had been completed long before the injury outside the State occurred, and also said that the liability of the principal contractor under the terms of the statute is secondary in nature, obviously meaning that the liability of a principal contractor to the employee of a subcontractor rests upon the existence of an employment contract between the subcontractor and his direct employees. The use of the term "secondary" in this context was not inconsistent with the existen of an absolute liability on the part of the principal contractor under the statute. It was pointed out in a note on the subject in 151 A.L.R. 1364, [fol. 386] 1367 that in some jurisdictions the Compensation Acts instead of making the liability of the general employer dependent on the carrying of insurance by the independent contractor, directly impose what amounts to "an absolute although perhaps secondary liability" on the former for injury to employees of the latter. It was obviously in this sense that the phrase under consideration was used in the *Younginer* case. The opinion was written by Mr. Justice Oxner, who cited his former opinion in the *Marchbanks* case, and it is inconceivable that he intended to overrule that decision without expressly saying so.

For other decisions interpreting the varying terms of State Workmen's Compensation Acts see also 58 A.L.R. 894; 166 A.L.R. 813.

The motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion of the defendant for judgment in its favor *non obstante veredicto* should have been granted. The judgments of the District Court will therefore be reversed with direction to enter judgment for the defendant.

Reversed.

[fol. 387] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7183

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., Appellant,

v.

JAMES EARL BYRD, Appellee.

Appeal from the United States District Court for the Western District of South Carolina.

JUDGMENT—Filed and Entered October 1, 1956

This Cause came on to be heard on the record from the United States District Court for the Western District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of South Carolina, at Anderson, with direction to set aside the verdict and enter judgment for the defendant (appellant here) in accordance with the opinion of the court filed herein.

October 1, 1956.

Morris A. Soper, United States Circuit Judge.

[fol. 388] [File endorsement omitted]

[fol. 389] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7183

[Title omitted]

Appeal from the District Court of the United States for the Western District of South Carolina at Anderson.

PETITION FOR REHEARING—Filed October 31, 1956

The petitioner prays that this Court grant a rehearing of its decision of October 1, 1956, reversing the judgment of the District Court and remanding the cause, with direction to enter judgment for the defendant, upon the following grounds:

FIRST

The decision of this Court, remanding the cause with direction to enter judgment for the defendant instead of grant a new trial, was obviously based upon its conclusion that, on the issue of defendant's affirmative defense of the [fol. 390] South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action, "the uncontradicted evidence" shows that the defendant "Blue Ridge has engaged * * * in the construction and maintenance of distribution lines, transmission lines and substations," and upon the fact that no reply evidence in contradiction to that of the defendant on this issue was introduced by plaintiff in the trial of the case. In directing the entry of judgment for the defendant, this Court apparently overlooked that the reason plaintiff did not introduce any testimony in contradiction of that of the defendant on this issue was because of the ruling of the Trial Judge dismissing this affirmative defense and withdrawing such issue from the jury before plaintiff's case in reply. Consequently, the direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of

his constitutional right to a jury trial on a factual issue. Therefore, this Court must have overlooked that the judgment of this Court is not an appropriate one which is just under the circumstances, as appears from the following contained in the transcript of record:

(Pages 352-353 of Reporter's Transcript.)

"Mr. Walker: The defendant rests, your Honor.
The Court: Anything in reply?
Mr. Edens: We have a motion, your Honor.
The Court: Gentlemen, go to your jury room.

(Jury retires.)

Mr. Hammer: If the Court please, at this time we move to strike the affirmative defense interposed by the defendant with respect to those allegations that the plaintiff is excluded or precluded from bringing this action by reason [fol. 391] of the fact that he was engaged in work which was part of the trade, business or occupation of the defendant within the meaning of the Workmen's Compensation Act, for the reason that it has been conclusively demonstrated that the defendant is not engaged in the business of constructing substations, * * * ."

(Page 355 of Reporter's Transcript.)

"Mr. Hammer: We are moving at this time in the nature of an involuntary dismissal.
The Court: You move to dismiss the defense?
Mr. Hammer: Yes, sir, at this stage of the game."

(Page 359 of Reporter's Transcript.)

"The Court: * * * I will have to grant the motion. I allow you an exception. Bring in the jury.

(12:55 P. M., Jury returns to open Court.)

The Court: Anything in reply?
Mr. Edens: Nothing, your Honor."

SECOND

In reaching the conclusion that the plaintiff while working on the construction of the substation as part of the

construction project was engaged in the trade, business or occupation of the defendant, this Court must have overlooked that there was no evidence that defendant ever engaged in the business of constructing a single project of the magnitude of the project on which plaintiff was injured, which project involved under the construction contract between the defendant and the independent contractor the construction of 24.2 miles of new transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two substations and a breaker station at a cost of $334,300.00. The construction work of a project of this magnitude is clearly the business, trade and occupation of an electrical contracting construction firm and not the trade, business and occupation of the defendant whose business is to supply and distribute electric. [fol. 392] power to its customers, within the meaning of the words "trade, business or occupation" used in their ordinary sense, as was so aptly stated by the District Judge on page 356 of the Reporter's Transcript, as follows:

"The Court: What bothers me about your defense is: what is the business of these people? The business of these people is selling electricity. They are not contractors to build substations."

THIRD

The conclusion of this Court that the defendant Blue Ridge constructed with its own facilities and employees three substations and was therefore engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action obviously was based upon the testimony of defendant's witness A. J. Hurt, manager of defendant company, who was the only witness that testified concerning the construction of substations.

In reaching this conclusion on the basis of Mr. Hurt's testimony, this Court apparently viewed his testimony out of context, and not as a whole, and overlooked that he finally admitted that the defendant company did not construct with its own facilities any substations, or, at least,

that his testimony contained self-contradictions and was evasive, consequently being susceptible to incredibility, and thus at best making the question of whether defendant constructed with its own facilities substations an issue to be passed upon by a jury, as appears from the evidence of record which shows that Mr. Hurt, although he first testified on direct and cross examination that the defendant company built with its own facilities and employees three substations, the last of which was built three years before trial at Liberty, South Carolina, on being recalled to the [fol. 393] stand the following day for further cross examination, he changed his testimony and admitted that the substation at Liberty built three years before the trial was not constructed by defendant with its own facilities, but by Sumter Builders, an independent contractor engaged in the construction business; and he then finally admitted that none of defendant's substations was built by defendant with its own facilities, as appears from the following evidence of record:

DIRECT EXAMINATION OF A. J. HURT, MANAGER OF DEFENDANT COMPANY

(Page 134 of Appellant's Appendix.)

"Q. Does the Cooperative construct substations with its own employees?

A. Yes, sir, we have constructed sub-stations.

Q. Has any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case?

A. Yes, sir, we have built sub-stations of that nature.

Q. Do you recall how many sub-stations the Cooperative has built with its own employees?

A. Yes, sir, we built three."

CROSS EXAMINATION OF A. J. HURT

(Pages 51-52 of Appellee's Appendix.)

"Q. How many sub-stations do you have?

A. We have six, sir.

* * * * * * *

Q. How long prior to the construction of this sub-station that Mr. Byrd got his arms burnt off on had it been since a substation had been constructed in behalf of the Blue Ridge or by them?

A. Approximately three years.

Q. Where was that one?

A. That's at Liberty.

Q. At Liberty?

[fol. 394] A. Yes, sir, South Carolina.

Q. Who built that?

A. We did, sir.

Q. Three years before?

A. Yes, sir."

A. J. HURT RECALLED FOR CROSS EXAMINATION
(the following day)

(Pages 72-74 of Appellee's Appendix.)

"Q. Did I understand you—I mean, I understood yesterday that you testified you had six substations in the Blue Ridge set-up?

A. I think I said five or six, sir, yes, sir.

Q. Is that correct?

A. Yes.

Q. Is it five or six?

A. I would say six, sir.

Q. Will you tell me where they are?

A. They are at Liberty.

* * * * * * *

Q. You didn't build the one at Liberty, did you?

A. The station there——

Q. Three years ago, you didn't build that substation yourself?

A. No, sir, I didn't intend to give that impression, sir.

* * * * * * *

Q. And the substation at Liberty was built by whom?

A. The one there now, sir, I don't know who built it offhand, sir.

Q. You don't know who built your substation at Liberty?

A. Not right now, I do not, sir.

Q. Would it refresh your recollection to name Sumter Builders? Do you recall now that they built that substation?

A. Since you mentioned it. They did some work for us, sir.

[fol. 395] Q. I didn't ask you that. I said, didn't they build your substation at Liberty? You don't know whether they did or not?

A. I would say they did, yes, sir.

* * * * * * *

Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir."

The Court, in concluding that the uncontradicted evidence and only inference to be drawn from Mr. Hurt's testimony was that defendant had constructed with its own facilities and employees three substations, also must have overlooked the evidence of record in the light of the colloquy between the District Judge and counsel for defendant, wherein the Judge during defendant counsel's argument in opposition to the motion to dismiss, stated that he (the Judge) understood that the witness Hurt had changed his testimony given the day previous that defendant built three substations with its own employees, as appears from the following contained in the Reporter's Transcript:

(Page 356 of Reporter's Transcript.)

"The Court: After Mr.—the gentleman—corrected his testimony, how many substations have they built?

Mr. Walker: They have built three, your Honor.

The Court: I understood he changed his testimony, that they had not built three."

And finally, although defendant's counsel contended that Blue Ridge built with its own facilities and employees three of the six substations, the evidence of record conclusively shows that none of the six substations operated by Blue Ridge were built by Blue Ridge with its own facilities or employees, as appears from the following evidence of record:

[fol. 396] (Page 358 of Reporter's Transcript.)

"The Court: If they were engaged in that business, why did they go to Charlotte and hire this contractor? If they were engaged in that business, they would have done it themselves. Instead of that, they go to Charlotte and get a contractor not only to build this substation but to build others in the past.

Mr. Walker: He testified they did it to expedite the work. Insofar as expediting the business.

The Court: According to your own testimony, you say they only built three and that is half of them. They owned six or seven?

Mr. Walker: They have six, yes, sir.

The Court: According to you they built half of their substations.

Mr. Walker: I believe one of those three has been subsequently replaced, but still they are in the business."

* * * * * * *

A. J. Hurt Recalled for Cross Examination

(Page 75 of Appellee's Appendix.)

"Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir.

Q. Thank you very much."

Moreover, this Court in reaching the conclusion that Byrd's work was part of the business of the defendant, also must have overlooked the evidence of record wherein Mr. Hurt, defendant's manager, disclaimed all responsibility for making an investigation, which would have been defendant's responsibility if Byrd's work were part of defendant's business rendering it liable under the Workmen's Compensation Act, because Mr. Byrd was not "one of our men" and "the station was not ours," as appears from the following evidence of record:

[fol. 397] Witness A. J. Hurt

(Pages 42, 43 of Appellee's Appendix.)

"Q. Was any investigation made?

A. I don't know, sir. Not for the Blue Ridge Coop because Mr. Byrd was not our man, sir.

Q. And you felt that you were only responsible for your men that were hurt?

A. That was all I was responsible for and the station was not ours, sir."

* * * * * * *

"Q. Did you inquire from him as to what he knew about this accident?

A. No, sir, because, as I say, it was no concern of mine because of the fact that it was not one of our men, sir."

* * * * * * *

Notwithstanding the foregoing references to the record, if the testimony of Mr. Hurt on the material issue of whether defendant Blue Ridge built with its own facilities and employees three substations can be construed to mean that defendant had built substations with its own facilities and employees, petitioner assures this Court that, on the basis of his information and belief, he would, if afforded an opportunity, produce testimony and evidence far different from such construction of Mr. Hurt's testimony, and states his *bona fide* belief that he can show, at the least, a genuine dispute over this material fact.

FOURTH

The decision of this Court was also based upon its conclusion that the South Carolina case of *Miles v. West Virginia Pulp and Paper Company*, 212 S. C. 424, 48 S. E. (2d) 26 was not applicable. In reaching this conclusion, it is respectfully submitted that this Court overlooked the principle announced by the Supreme Court of South Carolina that an employee of an independent contractor cannot be deemed to be in the performance of the trade, business [fol. 398] or occupation of the person (owner) engaging the independent contractor where there is no ownership by such person of the subject matter of the work. And it is clear from defendant's answers and its answers to the interrogatories contained on pages 79 through 81 of Appellee's Appendix that the defendant, at the time plaintiff lost both arms by reason of touching the live wire, had not accepted

and did not own, possess nor control the substation and lines on which plaintiff was working. That the defendant did not own the substation at the time of plaintiff's injuries is also apparent from a reading of the decision of this Court in the instant case wherein in discussing the question of liability it is stated that "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days."

The decision of this Court was also based upon its conclusion that *Glidden Rural Electric Cooperative* v. *Iowa Employment Security Commission*, 236 Iowa 910, 20 N. W. (2d) 435, was not applicable. In reaching this conclusion the Court overlooked the principle contained in the cited case that construction work performed by an independent contractor for a Rural Electric Cooperative is not part of the trade, business or occupation of a Rural Electric Cooperative. Obviously the cited case was controlling on the facts herein wherein it appeared that plaintiff was injured as an employee of an independent contractor performing construction work.

The decision of this Court was also based upon its conclusion that the South Carolina cases of *Marchbanks* v. *Duke Power Company*, 190 S. C. 336, and *Boseman* v. *Pacific Mills*, 193 S. C. 439, were controlling on the facts herein. In reaching this conclusion the Court must have overlooked that each of those decisions was confined to facts where the work being performed was on a facility owned [fol. 399] by the "owner," a necessary prerequisite to make an "owner" liable under the Workmen's Compensation Act, *Miles* v. *West Virginia Pulp and Paper Company*, *supra*; and, clearly, the defendant did not own the facility on which plaintiff was working when injured. Evidently, this Court also overlooked that those decisions were confined to factual situations where each of the injured employees was performing maintenance work on a facility owned by the "owner," as distinguished from the work of constructing a new facility not yet "turned over to the owner," which was the work being performed by plaintiff at the time he was injured and lost both of his arms. Moreover, the decision of this Court in the instant case is in direct con-

flict and irreconcilable with the decision of this Court in *Sears, Roebuck and Company* v. *Wallace*, 172 Fed. (2d) 802, wherein the Court held that extensive alteration work performed by an independent contractor for another person (owner) is not part of the trade, business or occupation of such other person (owner).

The decision of this Court was predicated upon its conclusion that the cases of *Miles* v. *West Virginia Pulp and Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 46; *Benbow* v. *Edmunds High School*, 220 S. C. 363, 67 S. E. (2d) 680; *Horrell* v. *Gulf & Valley Oil Co.*, 15 La. App. 603, 103 So. 709; *Packett* v. *Moretown Creamery Co.*, 91 Vt. 97, 99 A. 638, and *Wallace* v. *Sears Roebuck & Co.*, 4 Cir., 172 F. (2d) 802, were not applicable herein under its reasoning that in each of the cited cases the work performed by the employee of the independent contractor was not part of the owner's business because "the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged". In reaching this conclusion this Court must have overlooked that the facts in the cited cases are on "all fours" with those in the instant case, for here the construction [fol. 400] work of large projects, including the construction of the substations, performed herein, although useful to the defendant "owner's" business of supplying and distributing electricity to its customers, is a trade or occupation in which the defendant is not engaged. In the case at bar the only one engaged in the trade or occupation of an electrical construction contractor involving the work performed herein was Bouligny Construction Company—a trade or occupation in which the defendant Blue Ridge was clearly not engaged.

For the reasons set forth above and in the Brief filed by appellee, it is respectfully urged that a rehearing be granted, and that upon such rehearing the judgment of the District Court be affirmed, or in the alternative, the cause be remanded with directions to the District Court to grant a new trial.

Respectfully submitted, Henry H. Edens, Henry Hammer, William E. Chandler, Jr., Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented and filed in good faith and not for delay.

Henry H. Edens, Henry Hammer, William E. Chandler, Jr.

[fol. 401] IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT ANDERSON.

ORDER DENYING REHEARING—Filed and Entered November 15, 1956.

This Court having at its October term, 1956, rendered its decision reversing the judgment of the said District Court appealed from in this cause, and the appellee having on October 31, 1956, filed a petition for a rehearing of the said cause, and the same having been carefully considered,

[fol. 402] It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days. November 15, 1956.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 403] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 404] SUPREME COURT OF THE UNITED STATES
No. 638, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—February 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HENRY HAMMER,
Columbia, S. C.,

HENRY H. EDENS,
Columbia, S. C.,

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Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on October 1, 1956.

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (App. 19-35) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956. Petition for rehearing was denied on November 20, 1956. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS INVOLVED

1. Where, because of the ruling of the District Court, there is no occasion in the trial of a case for a plaintiff to introduce evidence of material facts in conflict with those produced by defendant on the issue of an affirmative defense, does a Court of Appeals, in reversing a judgment for plaintiff on such issue, have the power also to direct entry of judgment for defendant?

2. Does a Court of Appeals, in reversing the ruling of a District Court dismissing an affirmative defense, have the power also of directing entry of judgment for defendant on the issue of such defense instead of merely ordering a new trial, where the evidence pertaining to this issue is subject to conflicting inferences and conclusions which may be drawn by reasonably minded men?

3. May a Court of Appeals reverse the action of a Trial Judge dismissing an affirmative defense where the evidence adduced by defendant in support of such defense is legally insufficient to warrant the submission of the issue of such defense to the jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law".

28 U. S. C. 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, Workmen's Compensation, Code of Laws of South Carolina, 1952.

"Sec. 72-111. **Liability of owner to workmen of sub-contractor.**

When any person * * * referred to as "owner", undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person (* * * referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had immediately been employed by him."

"Sec. 72-121. **Employee's rights under Title exclude all others against employer.**

The rights and remedies granted by this Title to an employee when he and his employer have accepted

the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee * * * as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-101. **When acceptance of provisions presumed.**

Every employer and employee * * * shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby * * *."

STATEMENT OF CASE

Petitioner, a resident of North Carolina, brought suit against respondent, Blue Ridge Rural Electric Cooperative, Inc., a South Carolina Corporation engaged in the business of supplying and distributing electric power, to recover damages for negligence in causing and permitting electric current to run into a structure—a substation—in the process of construction on which petitioner was working as an employee of an independent contracting construction firm under contract by respondent to construct a large project, including the substation involved herein, at a cost of $334,000.00 to be used by respondent upon completion, and resulting in the loss of both forearms of petitioner who at the time of his injuries was twenty-four years of age, married, the father of two children, and had an earning capacity of approximately $5,000.00 per year.

Approximately two weeks before trial, respondent was permitted by the District Court to file an amended answer which plead as an affirmative defense that the work of constructing the substation performed by petitioner at the time of his injury was the trade, business and occupation of respondent and therefore the South Carolina Workmen's

Compensation Act, Sections 72-111 and 72-121, was petitioner's exclusive remedy and operated as a bar to the instant suit.

At the trial of the case respondent in support of its alleged defense that it was engaged in the business of constructing substations produced as a witness its manager, A. J. Hurt, who testified that respondent had built with its own employees and facilities three of its six substations, the last of which was built at Liberty, South Carolina, three years previous to petitioner's injuries. On re-cross examination, however, the witness Hurt admitted that respondent, not only did not build with its own facilities and employees the substation at Liberty, South Carolina, but also that it did not build with its own facilities and employees any of its six substations. His testimony was also equivocal and evasive.

At the conclusion of respondent's case and before petitioner's case in reply, petitioner tested the legal sufficiency of respondent's evidence as to the issue of the affirmative defense by moving to dismiss this defense. The District Judge granted the motion and thereupon requested whether petitioner had any reply testimony, to which he responded that he had none.

After petitioner had rested with the response that he had no reply testimony, respondent moved for a directed verdict on the ground, *inter alia*, that the work of constructing the substation performed by petitioner at the time of his injury was part of the business, trade or occupation of respondent. This motion was denied and the case was submitted to the jury on the sole issues of negligence and contributory negligence.

The jury brought in a verdict of $126,786.80 in favor of petitioner upon which judgment was entered. Motion by

respondent for judgment *n. o. v.* or for new trial was denied.

Upon appeal, the Court of Appeals reached a factual finding, from its own view of the testimony, that respondent built three substations with its own facilities which the Court held conclusively supported respondent's theory and defense that respondent was not only in the business of supplying and distributing electricity, but also in the business of constructing substations. The Court therefore reversed the District Court's judgment.

The Court of Appeals did not stop there, however. It concluded that the testimony on this issue was uncontradicted, judged it as credible, and remanded the case with direction to enter judgment for respondent. Yet nowhere in its otherwise detailed opinion was there any discussion of the propriety of this direction. Petition for rehearing was filed requesting, at the least, that the judgment be modified to direct a new trial (App. 35-45) but was denied by the Court below on November 20, 1956. (App. 46.)

REASONS FOR GRANTING THE WRIT

1. **The decision herein is not in accord with applicable decisions of this Court:** The issues in this case are (1) whether a Court of Appeals has the power to deny a party the opportunity of presenting testimony which he had no occasion to present at the trial because of the ruling of the District Judge, by directing entry of judgment for the opposite party upon reversing the ruling of the District Judge; (2) whether a Court of Appeals has the power to weigh conflicting inferences and judge the credibility of witnesses; and (3) whether a Court of Appeals may reverse the action of a District Judge dismissing an affirmative defense where the evidence of defendant is legally insufficient to sustain its burden of proof.

On the first issue the decision of the Court below is in conflict with the holding of this Court that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits, by directing judgment against him, where such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Court declared erroneous by the Court of Appeals.

Weade v. Dickmann, Wright & Pugh, 337 U. S. 801;
Fountain v. Wilson, 336 U. S. 681;
Kaku Nagano v. McGrath, 342 U. S. 916.

In each case the question before this Court was whether the appellate court could order judgment for a successful appellant on an issue as to which the opposite party had no occasion in the trial court to produce evidence or controvert the material facts of the successful appellant.

The rationale of the foregoing cases applies with equal force to the instant case which presents the same important general problem. Petitioner's motion to dismiss the affirmative defense before his reply case was based upon the particular legal theory that the evidence of respondent in support of its affirmative defense was legally insufficient to support a verdict for respondent on this defense and consequently did not warrant the presentation of any reply testimony by petitioner on the issue of such defense. This motion was granted, and, therefore, not only was there a lack of occasion to controvert respondent's testimony on this issue, but any further testimony on this point would have been superfluous and would have transgressed the ruling of the District Judge. The action of the District Judge in disposing of this issue at the first opportunity which in his opinion was appropriate and in accord with

the rights of the parties was in consonance with the spirit of our federal procedural law as expressed in Rule 1 of the Federal Rules of Civil Procedure that there shall be a "just, speedy and inexpensive determination of every action."

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of his opponent's case in the trial court. It would thus tend to discourage, contrary to the spirit of the Federal Rules of Civil Procedure, mid trial attacks on the legal sufficiency of an opponent's case and consequently add to the time and expense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the Constitution which was not framed nor adopted to deprive a party of either the right to a jury trial or of the right to challenge the legal sufficiency of the opponent's case. "The Amendment is impartial in the guaranty of both." *Galloway v. U. S.*, 319 U. S. 372, 393.

Also the decision of the Court below directing entry of judgment for defendant is not an "appropriate" judgment which was "just" under the circumstances, and therefore not authorized by 28 U. S. C. 2106. *Bryan v. U. S.*, 338 U. S. 552.

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review.

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution:** The Court below, in reversing, undertook to direct the entry of judgment for

the respondent under the assumption that (1) the testimony of respondent's manager, A. J. Hurt, that respondent built with its own facilities three of its six substations was uncontradicted, (2) Hurt's testimony was credible and therefore conclusive and (3) the only inference or conclusion deducible from such testimony was that respondent was engaged in the business of constructing substations. Petitioner challenges both the power and assumption of the Court below. He submits that the witness Hurt's testimony, although not contradicted by adverse testimony, was self contradictory. He also submits that by reason of such self contradictions, evasiveness of the witness, his interest in the case and his manner of testifying, the credibility of the witness was clearly put in issue, which is for a jury to determine. Petitioner also submits that even if the credibility of the witness Hurt were not an issue, and even if the record can be viewed as if there were testimony in the case that respondent constructed three substations with its own facilities, the last of which was constructed three years before petitioner's injuries, despite the subsequent change of Hurt's testimony concerning these facts, the conclusion is clear that respondent had abandoned such work for a period of three years prior to petitioner's injury and was not engaged in the business of constructing substations at the time of the injuries. At the least, these circumstances presented for the determination of a jury the factual question of whether respondent was engaged in the business of constructing substations so as to invoke the basic defense of the South Carolina Workmen's Compensation Act.

That it would be an undue invasion of the jurys' historic function for an appellate court to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence is an established rule of judicial review.

Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

It is also well settled that testimony of a witness, even if not contradicted by adverse testimony of other witnesses, raises an issue of credibiliy which is for a jury to determine where the witness has an interest in the outcome of the case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 621, his testimony is self-contradictory, evasive, equivocal, clouded with uncertainties and generalities, or his manner of testifying gives rise to doubts of his sincerity, *Quock Ting v. U. S.* 140 U. S. 417, 20 Am. Jur. page 1030, Section 1180 *et seq.*

The Court below, in directing entry of judgment for respondent, contrary to established principles of law and invading the province of the jury, judged the credibility of the material witness A. J. Hurt and viewed the case in the light most favorable to the respondent; it relied upon the testimony of Mr. Hurt that respondent used its own facilities and employees to construct three of its substations, despite his subsequent change of testimony, as conclusive that the respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to petitioner's action herein.

Viewing the testimony of Mr. Hurt as a whole, as it must be viewed on appeal, and not out of context as viewed by the Court below, it becomes clear that his credibility became an issue determinable by a jury; and, even assuming that after Mr. Hurt completed his recross examination there was evidence remaining in the record that respondent had used its own facilities to construct substations, it

is clear from the record that respondent at the time of petitioner's injury not only had abandoned such work but also that the evidence was subject to conflicting inferences and conclusions on the question of whether respondent was engaged in the business of constructing substations.

The evidence of record shows (1) that respondent had six substations, (2) that on direct and cross examination respondent company's manager, A. J. Hurt, testified that three of the substations were constructed with respondent's own facilities and employees, the last of which was constructed at Liberty, South Carolina, three years prior to petitioner's injuries; (3) that on being recalled to the stand for recross examination the following day, Mr. Hurt stated that respondent did not use its own facilities and employees to construct its substation at Liberty, South Carolina, three years prior to petitioner's injuries, but that the work was done by an independent contracting construction firm engaged in the business of constructing substations; (4) that Mr. Hurt finally testified on recross examination that respondent did not use its facilities or employees to build any of its six substations; (5) that Mr. Hurt's testimony was evasive as to the number of substations respondent operated; (6) that he refused to answer a material question propounded by petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might subject the witness to contempt of court; and (7) that Mr. Hurt's testimony on depositions taken before trial was in direct conflict with the knowledge he professed to have about material facts to which he testified at the trial. Under the foregoing evidence, even if it can be held that the action of the District Judge dismissing the affirmative defense was erroneous, the credibility of the witness Hurt, the weight of his testimony and the conflicting inferences and

conclusions that may be drawn from the evidence, are all questions which should be determined by a jury.

Therefore, it is respectfully submitted that the Court below, by substituting its view of the case for that which should be determinable by a jury, has invaded the province of the jury, contrary to the rights of petitioner under the 7th Amendment to the Constitution of the United States.

3. **The action of the Court below, in reversing the ruling of the District Judge dismissing the affirmative defense, is inconsistent with applicable federal procedure and contrary to the applicable state law:** The action of the Court below in reversing the ruling of the District Judge dismissing the affirmative defense is in direct conflict with the holding of this Court that where a party having the affirmative of an issue has the occasion and the opportunity to produce evidence on such issue but the evidence produced thereon is legally insufficient to support the burden of the party's proof, such issue should be withdrawn from the consideration of the jury.

Galloway v. United States, 319 U. S. 372.

In the instant case, although Mr. Hurt testified on direct and cross examination that respondent used its own facilities to construct three substations, the record shows that on recross examination he flatly changed his testimony and stated that respondent did not construct with its own facilities and employees any of the substations. This left the record with no evidence upon which a finding could be made that respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a defense. The District Judge so considered it and thus it became his duty, in accordance with applicable federal law, to withdraw this issue from the jury.

Moreover, the pleadings, respondent's answers to interrogatories and the evidence of record show conclusively that the substation under construction on which petitioner lost both his forearms was neither owned, controlled nor possessed by respondent at the time of petitioner's injuries and that respondent had no interest or concern in the work performed by petitioner on the substation during the course of its construction. Under applicable South Carolina law, *Miles v. W. Va. Pulp and Paper Co.*, 212 S. C. 424, in order to render an "owner" liable for the payment of Workmen's Compensation to an injured employee of an independent contractor it is a necessary requisite that the subject-matter of the work performed by the employee at the time of his injury be **owned** by the "owner." The South Carolina Supreme Court made it clear in the cited case that in other South Carolina cases where employees of subcontractors were held to come within the Act as against the person (owner) engaging the subcontractor, the subject-matter of the work performed by each employee was **owned** by the "owner," and the Court was also careful to point out this distinguishing feature in rejecting the application of the Act to the facts in the cited case, as follows:

> "In all three cases just cited, the timber cut and transported to the employer's manufacturing plants **was the property of the employer,** which is in significant contrast to the facts in this case. Here there was **no ownership** by the defendant of the timber or the harvested pulpwood prior to the delivery of the latter to the railroad company for transportation to the defendant" (Emphasis added.)

So, likewise, as appears from the opinion of the Court below in the instant case, "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days."

The Court below held that the South Carolina cases of *Marchbanks v. Duke Power Company*, 190 S. C. 336, and *Boseman v. Pacific Mills*, 193 S. C. 479, were controlling. In each of the cited cases it will be noted that (1) the employee performed **maintenance** work required to be performed periodically and recurrently in order to carry on and continue the business of the owner, no matter how large, small, static or progressive such business might be, and (2) that such work was performed on a facility **owned** by the defendant. Such facts are in significant contrast to the facts herein that petitioner at the time of the injury was performing the non-periodic and non-recurrent work of constructing a new facility to be turned over to the respondent upon completion and that the subject-matter of the work was not owned by the respondent at the time of petitioner's injuries. Compare *Tucker v. Texas Oil Co.* (C. A. 5), 203 F. (2d) 918.

The ruling of the Chief Judge of the District Court for the Western District of South Carolina, Honorable C. C. Wyche, involved a question of local substantive law of South Carolina. His ruling was in accord with correct principles of law and in consonance with the philosophy announced in the decisions of the South Carolina Supreme Court and enunciated by the Court of Appeals for the Fourth Circuit in a prior case, *Sears Roebuck v. Wallace*, 172 F. (2d) 802, a case on which Judge Wyche sat as a member of the Court of Appeals. No reason was stated in the opinion of the Court below for not applying the controlling principles of the *Sears case* in which it was held that the work of making alterations by an independent contractor in a storage warehouse of the owner was not the business of the owner, except the brief passing remark that the *Sears case* was distinguishable from the instant case "on the ground that the work done, although useful to

the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged." It is clear, however, from a reading of both decisions and the record herein that the facts in the instant case are much stronger than those in the *Sears case* to warrant the exclusion of the Workmen's Compensation Act as a defense and that the decision of the Court below in the case at bar is in direct conflict and irreconcilable with the *Sears case*, both on the law and the facts.

The Court below, not having among its members a South Carolina lawyer, in reversing the action of the Chief District Judge, contrary to the accepted and usual course of judicial review, did not give due weight to the judgment of the District Judge on a question of local law of a state in which the District Judge was an outstanding and able lawyer of long experience who had served in the South Carolina legislature and had sat as an acting Associate Justice of the State Supreme Court. *Bernhardt v. Polygraphic Company of America*, 350 U. S. 198; *Standard Brands v. Bateman*, 184 F. (2d) 1002 (C. A. 8) cert. den. 340 U. S. 942. Appellate courts should be slow to impute to trial courts a want of perspicacity in determining the local law, and, as stated in headnote I *Nordin v. May*, 208 F. (2d) 131, (C. A. 8), "where question to be determined involved application of state law, which, at best, was at least uncertain on the subject, Court of Appeals on appeal would defer to judgment of Federal District Court concerning the state law."

The unreported decision of another District Judge of South Carolina, *Ballard, Adm'x. v. Southern Oil Co.*,[1] in-

[1] *Ballard, Adm'x. v. Southern Oil Co.*, Civil Action No. 5198, E. D. S. C., was decided by the Chief Judge of the District Court for Eastern District of South Carolina, who also was an outstanding lawyer of long experience in South Carolina. His opinion, which is included as part of the record for the use of this court, is set forth in full in Appendix to Appellee's brief in court below.

volving a different theory in the application of state law to a case factually similar to the present case also supports the result of the instant case in the District Court. The Court below, however, likewise, rejected the judgment of the other local District Judge in the application of state law.

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a Writ of Certiorari, should reverse the judgment of the Court below, and should affirm the judgment of the District Court or order the Court of Appeals to remand the case for a new trial.

Respectfully submitted,

HENRY HAMMER,

HENRY H. EDENS,

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Attorneys for Petitioner.

APPENDIX

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DECISION OF COURT OF APPEALS

(Argued June 7, 1956. Decided October 1, 1956.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and MOORE, District Judge.

Ray R. Williams, and Wesley M. Walker (Leatherwood, Walker, Todd & Mann, and Williams & Henry on brief) for Appellant, and Henry Hammer (Henry H. Edens and William E. Chandler, Jr., on brief) for Appellee.

SOPER, Circuit Judge:

James Earl Byrd, an electric lineman in the employ of R. H. Bouligny, Inc., a construction company, lost both forearms on February 17, 1953, when he accidentally came in contact with a live wire while working on a construction project of Blue Ridge Rural Electric Cooperative, Inc., which was engaged in the distribution of electricity in rural areas. Byrd filed a claim against his employer under the Workmen's Compensation Act of South Carolina and collected full benefits. He then brought the present suit against the Cooperative claiming that the accident was due, at least in part, to its negligence. Blue Ridge defended on the grounds (1) that the accident was not due to its negligence but to the negligence of Bouligny and the contributory negligence of Byrd, and (2) that even if Blue Ridge were negligent, Byrd's only remedy was afforded by the Compensation Act since the work being done by the contractor was part of the business of the Cooperative. The District Judge rejected the contention that the liability of the Cooperative was confined to the payment of compensation and submitted the negligence questions to the jury, which found a verdict for the plaintiff in the sum of $126,786.80, and the defendant appealed.

Blue Ridge Rural Electric Cooperative was organized as a rural electric cooperative in 1939 under the provisions of the Rural Electric Cooperative Act of South Carolina, Chapter 15 of the South Carolina Code of 1952. Section 12-1021 of this statute authorizes the organization of cooperative nonprofit membership corporations for the purpose of supplying electric energy and extending its use in

rural areas; and §12-1025 empowers a cooperative to generate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment, and any and all kinds of property which may be necessary or convenient to accomplish the purposes for which the corporation is organized.

Acting under this statute, Blue Ridge has engaged in supplying electricity to the rural people of four counties in South Carolina, and in the construction and maintenance of distribution lines, transmission lines and substations. The system was begun by the State Rural Electrification Authority, and comprised 300 miles of line serving 1,100 consumers when it was taken over by Blue Ridge in 1939. Since then it has steadily grown until at the time of the trial in the District Court in 1955, it had 2,000 miles of line and 10,816 consumers or members.

On June 23, 1952, Blue Ridge let a contract to Bouligny in order to expedite its construction work. It had secured a government loan under a loan agreement approved by the Rural Electrification Administration, acting by the Administrator, and the construction contract was executed in conformity with the provisions of the loan agreement. The contract called for the construction of approximately 24.2 miles of new electric transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two appurtenant substations and a breaker station.

The accident in this case happened at one of the substations, known as Walhalla, when the lineman came in contact with a live wire on a line which the contractor was converting from a one-phase or one-wire line to a two-phase or two-wire line. It served the residents of a rural section known as the Ebenezer Community and was connected at a right angle with a transmission line on a highway at a point about 1,250 feet from the Walhalla station.

The conversion required the relocation of a portion of the Ebenezer line where it left the highway, and the running of a new line from the new connecting point to the substation; and meanwhile it was necessary to do the work

in such a manner as to continue the service to the Ebenezer Community as far as it was possible to do so. The construction contract expressly provided in this respect that at the beginning of each day the contractor would notify the owner of the lines to be de-energized and at the end of each day the contractor would notify the owner of the lines to be re-energized, and that in each instance the owner would take the necessary steps to comply with the notice.

On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days. The wires running from it to the new connecting point on the Ebenezer line were also in place and one of them received current from another source and was used to service the community. It was brought from the connecting point to a double-end pole located within the fenced area of the substation at a distance of seventy-five feet, and ran thence to the substation itself. It was intended that the current should not run to the substation but should be cut off at the pole by postponing the installation of a connecting device thereon, known as a jumper, until the substation was completed. Unfortunately, through a mistake of a foreman of the contractor, a permanent closed jumper was placed on the pole and a foreman of the owner was notified that it was safe to energize the line, and he did so without inspecting the line himself. An examination would have shown that the current would run through to the substation. In this situation another foreman of the contractor, who also failed to inspect the line, took the plaintiff lineman to the substation and directed him to make a connection between the line outside and the equipment inside the substation,—and the lineman in attempting to do so caught hold of the live wire, believing it to be dead, and was burned.

That the accident was caused primarily by the negligence of employees of the Bouligny company, which is not a party to the instant suit, was abundantly proved and is not in dispute, and on this account Blue Ridge, the defendant company, contends that it should be exonerated. It has been noted above, however, that the construction contract imposed upon Blue Ridge alone, the duty of put-

ting on and cutting off the current during the course of the work when notified by the contractor; and there was additional evidence offered by a qualified electrical engineer that standard safety procedure in electrical work requires that a person who is responsible for letting power into existing lines to which new lines are connected, must personally inspect the connection before energizing the old lines. Because of this evidence, the issue of negligence on the part of Blue Ridge was submitted to the jury.

Blue Ridge also defended on the ground that recovery was precluded by contributory negligence on the part of the lineman who could have readily seen the permanent bond on the double-end pole only seventy-five feet away, if he had taken the pains to trace the wire from the substation to the pole. The evidence, however, showed not only that he was acting under the orders of his superior when he was hurt, but that he relied on the standard safety regulation that a new construction built by a contractor must not be energized until it has been inspected, approved and turned over to the owner. Accordingly, the issue of contributory negligence was also submitted to the jury.

We do not question the submission of the issue of contributory negligence to the jury under these circumstances. The sufficiency of the evidence to show negligence on the part of the Cooperative is, however, not free from doubt, but it is not necessary to decide this point in view of the basic defense that the lineman's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina, Title 72 of the South Carolina Code of 1952. That statute provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the execution of the whole or any part thereof, the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him. §72-111.

When a contractor agrees to do work for another person which is not a part of the trade or business of the other person and contracts with a subcontractor to do the whole

or part of the work, the contractor becomes liable to pay compensation to the workmen of the subcontractor. §72-112. A like provision for the protection of the workmen of a subcontractor is made in §72-113. When a principal contractor [2] is liable to pay compensation under these sections, he is entitled to indemnity from any person who would have been liable to pay compensation independently of the sections. §72-115. A workman may recover compensation from the subcontractor instead of from the principal contractor, but not from both. §72-116. Every employer who accepts the compensation provisions of the Act is required to secure the payment thereof by insurance or otherwise. §§72-401 *et seq.*

The rights and remedies granted by the statute to an employee exclude all other rights and remedies of the employee as against his employer at common law or otherwise, on account of injury, §72-121; and the acceptance of an award under the statute or the procurement and collection of a judgment in an action at law is a bar to proceeding further with the alternate remedy. §72-123.

It was conceded in the Court below that both Blue Ridge, the owner, and Bouligny, the contractor had complied with and were operating under the Compensation Act, and that after the injury the lineman had elected to receive and had accepted full benefits thereunder from Bouligny; and it was also conceded that if the work being done at the time of the injury constituted a part of the business of the cooperative, the present suit must fail. The burden of the appellee's argument rests on the assertion that the construction work done by Blue Ridge itself was limited to everyday operations of hooking up connections for customers and did not include extensive line construction, and in view of the fact that the lineman was hurt while attempting to connect the substation with the new line, it is contended with especial emphasis that the construction of the substation was not part of the business of the Cooperative.

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[2] It was said in *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 362 that the term "principal subcontractor" is synonymous with owner.

The uncontradicted evidence as to the construction work done by the employees of Blue Ridge may be summarized as follows: It maintains an outside crew of 8 linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It constantly builds new lines to new consumer members and builds extensions, some short and some long, up to eight miles in length; but since the end of World War II so many persons in rural areas have demanded electrical service that it has employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. All of the construction work, whether done by itself or by outside contractors, is done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which is employed by Blue Ridge to make sure that the system complies with the requirements of the Rural Electrification Administration of the United States.

The testimony with respect to the construction of the substations of Blue Ridge, stated most favorably to the appellee, discloses that originally Blue Ridge built three substations with its own facilities, but that all of the substations which were built after the war, including the six it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident it had no one in its direct employ capable of handling the technical detail of substation construction.

There can be no doubt that all of the work covered by the Bouligny contract was of the class which Blue Ridge was empowered by its charter to perform and that all of it was necessary to enable it to serve the growing needs of the rural communities. Furthermore, the main actor in the whole enterprise was the Cooperative itself. This is seen the more clearly when we round out, by way of illustration, the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Blue Ridge secured a loan of $334,300.00 from the United States under the Rural Electrification Act of 1934, as amended, to finance the construction work above

described, the lines to be located along such routes as the owner with the approval of the Administrator should designate. Blue Ridge then entered into an engineering service contract with the Southern Engineering Company, whereby the Engineer agreed to render the engineering services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the Engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the Engineer after the procuring of rights of way and easements by the owner, and the supervision by the Eng er of all the details of the construction work as the representative of the owner.

The construction contract with Bouligny conformed to the requirements of the loan agreement. It defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the substations were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work.

From this description there can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and substations necessary for the distribution of the product, if these words are given their ordinary significance. The appellee says, however, that in the meaning of the compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employ-

Moreover, this Court in reaching the conclusion that Byrd's work was part of the business of the defendant, also must have overlooked the evidence of record wherein Mr. Hurt, defendant's manager, disclaimed all responsibility for making an investigation, which would have been defendant's responsibility if Byrd's work were part of defendant's business rendering it liable under the Workmen's Compensation Act, because Mr. Byrd was not "one of our men" and "the station was not ours," as appears from the following evidence of record:

WITNESS A. J. HURT

(Pages 42, 43 of Appellee's Appendix.)

"Q. Was any investigation made?

A. I don't know, sir. Not for the Blue Ridge Co-op because Mr. Byrd was not our man, sir.

Q. And you felt that you were only responsible for your men that were hurt?

A. That was all I was responsible for and the station was not ours, sir."

* * *

"Q. Did you inquire from him as to what he knew about this accident?

A. No, sir, because, as I say, it was no concern of mine because of the fact that it was not one of our men, sir."

* * *

Notwithstanding the foregoing references to the record, if the testimony of Mr. Hurt on the material issue of whether defendant Blue Ridge built with its own facilities and employees three substations can be construed to mean that defendant had built substations with its own facilities and employees, petitioner assures this Court that, on the basis of his information and belief, he would, if afforded an opportunity, produce testimony and evidence far different from such construction of Mr. Hurt's testimony, and states his *bona fide* belief that he can show, at the least, a genuine dispute over this material fact.

ees; and reliance is placed on the evidence that since the war Blue Ridge has sublet the construction of substations to outside contractors, and the line work performed by its own employees has been limited in extent. We do not think this interpretation of the statute is tenable. It will be noticed in the first place that §72-111 makes specific provision for the performance by a contractor of work which is part of the owner's business and in such case imposes upon the owner the same liability to pay compensation to the contractor's workmen as if they were immediately employed by him. In other words, the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In consequence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection.

The decisions of the Supreme Court of South Carolina are in accord with these views. Very similar was the case of *Marchbanks v. Duke Power Co.*, 190 S. C. 336, where the power company, like Blue Ridge, was in the business of distributing electricity which from time to time required the erection of poles and transmission lines. In carrying out this purpose, it contracted with an outsider to paint 170 metal poles, and one of his workmen was injured while doing the work and sued the power company in an action of tort. It was held that the suit could not be maintained, and that the worker's only remedy was under the Compensation Statute which relieved the power company of common Law Liability. Circuit Judge Oxner, now a Justice of the Supreme Court of the State, whose opinion was set out in full and approved by that Court, described the purpose of the Act in these words, 190 S. C. 343, 344:

> "It was evidently realized by the General Assembly that it would not be fair to relieve the owner of compensation to employees doing work which was a

FOURTH

The decision of this Court was also based upon its conclusion that the South Carolina case of *Miles v. West Virginia Pulp and Paper Company,* 212 S. C. 424, 48 S. E. (2d) 26 was not applicable. In reaching this conclusion, it is respectfully submitted that this Court overlooked the principle announced by the Supreme Court of South Carolina that an employee of an independent contractor cannot be deemed to be in the performance of the trade, business or occupation of the person (owner) engaging the independent contractor where there is **no ownership** by such person of the subject matter of the work. And it is clear from defendant's answers and its answers to the interrogatories contained on pages 79 through 81 of Appellee's Appendix that the defendant, at the time plaintiff lost both arms by reason of touching the live wire, had not accepted and did not own, possess nor control the substation and lines on which plaintiff was working. That the defendant did not own the substation at the time of plaintiff's injuries is also apparent from a reading of the decision of this Court in the instant case wherein in discussing the question of liability it is stated that "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days."

The decision of this Court was also based upon its conclusion that *Glidden Rural Electric Cooperative v. Iowa Employment Security Commission,* 236 Iowa 910, 20 N. W. (2d) 435, was not applicable. In reaching this conclusion the Court overlooked the principle contained in the cited case that construction work performed by an independent contractor for a Rural Electric Cooperative is not part of the trade, business or occupation of a Rural Electric Cooperative. Obviously the cited case was controlling on the facts herein wherein it appeared that plaintiff was injured as an employee of an independent contractor performing construction work.

The decision of this Court was also based upon its conclusion that the South Carolina cases of *Marchbanks v. Duke Power Company,* 190 S. C. 336, and *Boseman v. Pa-*

part of his trade or business by permitting such owner to sublet or subcontract some part of said work. Doubtless in many instances such contractors would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such contractors would not be required under the Act to carry compensation insurance. It was therefore, provided under the first paragraph that where such work in which the employee was engaged was part of the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not."

A like result was reached in *Boseman v. Pacific Mills*, 193 S. C. 479, where, in the execution of a contract between the owner of the mill and an independent contractor for the painting of a water tank maintained by the mill for fire protection, an employee of the contractor was killed by the unexplained explosion of the tank. A claim against the mill for Workmen's Compensation was resisted on the ground that the workman was not an employee of the mill and that the painting of the tank was not part of its trade or business, because the work was of such dangerous and unusual character that it was never done by the regular employees of the mill but was always let out by contract to an experienced steeplejack. In overruling this contention, the Court said (p. 483):

"The testimony was to the effect that the mill furnished all the paint, the ladders and any lumber or scaffolding necessary to do the work. As already seen, the contract itself contained a postscript that 'the above work is all subject to inspection and approval by representatives of Pacific Mills.' The tank was an integral part of the mill business. There was also testimony to the effect that the mill desired that the work on the inside of the tank be completed as soon as possible so that its everyday, ordinary service, that of fire protection, could be resumed, it being shown that the mill depended upon this tank for such protection. The very nature of the work done by the mill, that of the

manufacture of cotton into cloth, especially required the best of protection against fire. Hence this tank was particularly necessary and essential in the operation and carrying on of the business of the mill. It, therefore, follows that the painting of the tank was such a part of the trade, business or occupation of the Pacific Mills as would constitute Martin a subcontractor, and thus render the mill liable to the beneficiary of Boseman for payment of compensation." [3]

The appellee seeks to distinguish some of these cases on the ground that in them the injured man was engaged in maintenance work ordinarily performed by the employees of the owner in the operation of the business; but it is manifest that it would defeat the purpose of the Act to make the prime mover of an enterprise liable to pay compensation for injuries suffered in the work of maintenance or repair, whether he is negligent or not, but to exempt him in the more important and more extensive field of new construction. For the same reason, it cannot be held that an owner is not obliged to provide compensation for injuries incurred in the course of construction work performed on his behalf as part of his business, if he customarily lets the work out to independent contractors and does not perform it himself. It will have been noticed that §72-111 of the Act expressly covers an owner who undertakes to perform any work which is part of his business and contracts with any other person for the execution "*of the whole or any part of the work*". Thus, the statute recognizes that work done at the behest of the owner is owner's work; and unless he is held liable to pay compensation for injuries incurred in its progress the underlying purpose of the Act will be frustrated. The quotation from

[3] For other South Carolina cases in which the owner was found liable for compensation to injured employees of subcontractors, see *Kennerly v. Ocmulgee Lumber Co.*, 206 S. C. 481, where the owner of a sawmill let a contract for cutting timber on its own lands under its supervision; *Hopkins v. Darlington Veneer Co.*, 208 S. C. 307, where the owner of the plant subcontracted the cutting of timber on its lands; *Smith v. Fulmer*, 198 S. C. 91, where a bridge builder sublet the making of fills and the laying of pavement to a subcontractor. See also the decisions of this Court in *Doane v. E. I. du Pont de Nemours & Co.*, 209 F. (2d) 921; *Berry v. Atlantic Greyhound Lines*, 114 F. (2d) 255.

Boseman v. Pacific Mills set out above is particularly pertinent in this connection, as are also the decisions in *Purkable v. Greenland Oil Co.*, 122 Kan. 720 and *Wisinger v. White Oil Co.*, 5 Cir., 24 F. (2d) 101, cited with approval in *Marchbanks v. Duke Power Co., supra.* As was said in that case, 190 S. C. 363:

> "It is the clear purpose of the Act to make the owner, the person interested in having the work done, liable to the employee so injured".

It cannot be denied that Blue Ridge was vitally concerned in the construction of the equipment covered by the Bouligny contract, without which the distribution of its product would have been impossible.

The cases on which the appellee relies are distinguishable on the ground that the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not engaged. Thus, in *Miles v. W. Va. Pulp and Paper Co.*, 212 S. C. 424, the owner of a pulpwood plant engaged a contractor to supply him with pulpwood on a commission basis; in *Benbow v. Edmunds High School*, 220 S. C. 363, the school authorities employed an electrical contractor to repair a lighting fixture in a high school; in *Horrell v. Gulf & Valley Oil Co.*, 15 La. App. 603, a contractor was employed to install a furnace in an oil refinery; in *Packett v. Moretown Creamery Co.*, 91 Vt. 97, a contractor was employed to erect a building for a creamery; and in our decision in *Sears, Roebuck & Co.*, 172 F. (2d) 802, a corporation engaged in the sale of goods contracted with a builder to make certain alterations in a storage warehouse. In *Glidden Rural Elec. Cooperative v. Iowa Employment Security Commission*, 236 Iowa 910, the cooperative was successful in resisting an assessment for unemployment compensation tax on the grounds that it had never had as many as 8 employees and, although it had let contracts for the construction of lines, it had never engaged in the construction work except to make service connections, and hence the Court held that the work done by the contractor was not a part of the *usual* trade or business of the cooperative within the terms of the statute.

We conclude that the work performed by Bouligny under the contract was done in carrying on the trade or business of the Cooperative.

In the District Court the plaintiff conceded that he had no case if the work in which he was engaged when he was injured was part of the trade or business of Blue Ridge. He now contends, however, in the alternative, that even if the work was of this character he is not precluded from bringing the present action because Bouligny paid the compensation award and hence the acceptance of the award does not bar his suit under the provisions of §72-123 of the statute. Although the point is now raised for the first time we, nevertheless, consider it since it goes to the heart of the defense and the parties have discussed it in the briefs on this appeal.

The contention in our opinion cannot be sustained. It involves the erroneous assumption that although the statute imposes an absolute liability upon the owner of the business to provide compensation, usually effected by carrying insurance for the employees of the independent contractor, the owner loses the offsetting benefit of immunity from suit at law provided by the statute, if the injured workman elects to receive compensation from the contractor. It is generally held under statutes of this kind that both the owner of the business and his independent contractor, or the principal contractor and his subcontractor where they are the parties concerned are exempt from suit. A leading case on the subject is *State v. Bennett Bldg. Co.*, 154 Md. 159, where the building company was sued in an action at law for the death of an employee of a subcontractor who had undertaken to lay tile floors in a building under construction. Prior to the institution of the suit an award of compensation under the Maryland compensation statute had been paid by the sub-contractor. The Maryland statute like that of South Carolina provides that where a principal contractor undertakes under contract the execution of any work in the way of his trade or business and contracts with any other party as subcontractor for the execution of the whole or any part of the work, the principal contractor shall be liable to pay any workmen

employed in the execution of the work any compensation under the Act which he would have been liable to pay if the workmen had been immediately employed by him. In considering the effect of the statute and sustaining the defense that the principal contractor was exempt from suit at law the Court said (154 Md. 162-163, 165, 167-168):

> • • • "The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor, when he was not in law the employer of the injured workman. The result then is that where the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work. This absolute statutory liability is not affected by the fact that it is later provided, in section 62, that the workman may elect whether he shall enforce the compensation against the principal contractor or the subcontractor; or that, whenever an employee proceeds against the principal contractor, the latter shall have the right to join the subcontractor or any intermediate contractor as defendant or codefendant in the case; or that, when the principal contractor is liable to pay compensation pursuant to this section, he shall be entitled to indemnity from any employer who would have been liable to pay compensation to the employee independently or section 62. These provisions leave unimpaired the primary liability imposed by the statute upon the principal contractor. The first gives to the workman the choice of two primary liabilities, as but one is enforceable by him. The second is a matter of procedure, and the third relates to the question of indemnity to the principal contractor by the subcontractor, and neither concerns the liability of the principal contractor to the workman. This primary liability, so imposed by statute upon the principal contractor, is not based upon contract, since the legislation is predicated upon the fact that no contractual relation, as master and servant, exists between the principal contractor and the workman; nor does it flow from a breach of

duty, because the liability arises independently of the existence of fault on the part of the principal contractor. This legislation, however, finds its constitutional support in the consideration that the general welfare is promoted and conserved by requiring the employer and the workman to yield something of their respective rights toward the establishment of a principle and plan of compensation for their mutual protection and advantage."

* * * "It may be said that there were two employers of the dead man. One was his immediate employer, the subcontractor, whose relation was founded in contract; and the second was his more remote statutory employer, the principal contractor, whose status, with the rights and liabilities growing thereout, was created and determined by law."

* * * "If the construction by the appellant prevail, the dependent may recover compensation of the subcontractor, and also damages at common law against the negligent principal contractor, who is thus taken out of the act, by the dependent's choosing to file her claim against the subcontractor, but who would remain within the act, if she should file her claim for compensation against the principal contractor. In short, the liability of the principal contractor would not be fixed and determined by law, but by the arbitrary exercise of the dependent's will. The result of this contention would be to impose upon the general contractor an onerous and dual liability for compensation or damages, at the election of the employees of a subcontractor, while limiting his liability to his own immediate workmen to compensation alone. This theory would deprive a class of employers within the act of their exemption from all liability save that of compensation, which is an essential part of the general legislative plan. A construction so antagonistic to the fundamental principles underlying the enactment will not be adopted. If an employer is within the act to bear its liabilities, he must remain to be accorded its immun-

ities, in the absence of a clearly expressed legislative intention to the contrary."

The importance of this case for our purposes is seen by the approval given the decision in *Marchbanks v. Duke Power Co.* where, as in the pending case, the plaintiff claimed not only that the work being done was not part of the defendant's business but also that the remedy afforded by the Compensation Act was not exclusive. The Court said: (190 S. C. 351-352)

> "I now come to plaintiff's third and last contention to the effect that his remedy under the Compensation Act is not exclusive. Most of the cases cited as sustaining this contention involve acts which are materially different from that in force in this State in that no direct liability is imposed upon the principal or owner. These acts require such owner or principal to see that the contractor carries compensation insurance for the protection of his employees and only in instances where he fails to do this does liability on his part arise.
>
> "The best reasoned case that I have found on this question is that of *State v. Benjamin F. Bennett Bldg. Co.*, 154 Md., 159, 140 A., 52, 53. It involves an act similar in principle to that of this State."

The Court then quoted extensively from the decision of the Maryland Court.

In opposition, the appellee calls attention to the unreported decision of the District Court of the United States for the Eastern District of South Carolina in *Ballard Admx. v. Southern Oil Co.* and the decision in *Youginer v. J. A. Jones Const. Co.*, 215 S. C. 135. In the *Ballard case* it was held that an action at law would lie against the owner of a building for the death of a workman who was killed while working on the wall of a building for the owner as an employee of an independent contractor, although his estate had recovered compensation from his immediate employer. The decision was based on the theory that §72-111 of the South Carolina Compensation Act imposes liability on an owner to provide compensation only when the con-

tractor fails to provide coverage. We find it impossible to follow this decision since it seems to us to be in direct conflict with the decision of the Supreme Court of South Carolina in *Marchbanks v. Duke Power Co.* and the cases cited therein.

The decision in *Younginer v. J. A. Jones Const. Co.* is relied upon because the Court in its opinion described the liability imposed upon the principal contractor by §72-111 as secondary in nature; and this is taken by the appellee to mean that the principal contractor is only a guarantor and his liability to provide compensation arises only when the subcontractor fails to do so. We do not think that this interpretation of the language can be sustained. A claim for compensation was filed in the cited case by an injured man against his immediate employer under the South Carolina Act for an injury incurred in doing work outside the State; and it was necessary for the claimant to show that the contract of employment was made inside the State. For this purpose he relied on a previous contract of employment in the State between him and a subcontractor of the respondent which had been completely performed. The Court pointed out that the work in South Carolina and the claimant's employment therein had been completed long before the injury outside the State occurred, and also said that the liability of the principal contractor under the terms of the statute is secondary in nature, obviously meaning that the liability of a principal contractor to the employee of a subtractor rests upon the existence of an employment contract between the subcontractor and his direct employees. The use of the term "secondary" in this context was not inconsistent with the existence of an absolute liability on the part of the principal contractor under the statute. It was pointed out in a note on the subject in 151 A. L. R. 1364, 1367 that in some jurisdictions the Compensation Acts instead of making the liability of the general employer dependent on the carrying of insurance by the independent contractor, directly impose what amounts to "an absolute although perhaps secondary liability" on the former for injury to employees of the latter. It was obviously in this sense that the phrase under consideration was used in

the *Younginer case*. The opinion was written by Mr. Justice Oxner, who cited his former opinion in the *Marchbanks case*, and it is inconceivable that he intended to overrule that decision without expressly saying so.

For other decisions interpreting the varying terms of State Workmen's Compensation Acts see also 58 A. L. R. 894; 166 A. L. R. 813.

The motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion of the defendant for judgment in its favor *non obstante veredicto* should have been granted. The judgment of the District Court will therefore be reversed with direction to enter judgment for the defendant.

Reversed.

PETITION FOR REHEARING

The petitioner prays that this Court grant a rehearing of its decision of October 1, 1956, reversing the judgment of the District Court and remanding the cause, with **direction to enter judgment for the defendant,** upon the following grounds:

FIRST

The decision of this Court, remanding the cause with direction to enter judgment for the defendant instead of grant a new trial, was obviously based upon its conclusion that, on the issue of defendant's affirmative defense of the South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action, "the uncontradicted evidence" shows that the defendant "Blue Ridge has engaged • • • in the **construction** and maintenance of distribution lines, transmission lines and **substations**", and upon the fact that no reply evidence in contradiction to that of the defendant on this issue was introduced by plaintiff in the trial of the case. In directing the entry of judgment for the defendant, this Court apparently overlooked that the reason plaintiff did not introduce any testimony in contradiction of that of the defendant on this issue was because of the ruling of the Trial Judge dismissing this affirmative defense and

withdrawing such issue from the jury before plaintiff's case in reply. Consequently, the direction to enter judgment for the defendant instead of a direction to grant a new trial denies plaintiff his right to introduce evidence in contradiction to that of the defendant on the issue of defendant's affirmative defense, a right which he would have exercised if the District Judge had ruled adversely to him on his motion to dismiss, and thus deprives him of his constitutional right to a jury trial on a factual issue. Therefore, this Court must have overlooked that the judgment of this Court is not an appropriate one which is just under the circumstances, as appears from the following contained in the transcript of record:

(Pages 352-353 of Reporter's Transcript.)

"Mr. WALKER: The defendant rests, your Honor.

The COURT: Anything in reply?

Mr. EDENS: We have a motion, your Honor.

The COURT: Gentlemen, go to your jury room.

(Jury retires.)

Mr. HAMMER: If the Court please, at this time we move to strike the affirmative defense interposed by the defendant with respect to those allegations that the plaintiff is excluded or precluded from bringing this action by reason of the fact that he was engaged in work which was part of the trade, business or occupation of the defendant within the meaning of the Workmen's Compensation Act, for the reason that it has been conclusively demonstrated that the defendant is not engaged in the business of constructing substations, * * *."

(Page 355 of Reporter's Transcript.)

"Mr. HAMMER: We are moving at this time in the nature of an involuntary dismissal.

The COURT: You move to dismiss the defense?

Mr. HAMMER: Yes, sir, at this stage of the game."

(Page 359 of Reporter's Transcript.)

"The COURT: * * * I will have to grant the motion. I allow you an exception. Bring in the jury.

(12:55 P. M., Jury returns to open Court.)

The COURT: Anything in reply?
Mr. EDENS: Nothing, your Honor."

SECOND

In reaching the conclusion that the plaintiff while working on the construction of the substation as part of the construction project was engaged in the trade, business or occupation of the defendant, this Court must have overlooked that there was no evidence that defendant ever engaged in the business of constructing a single project of the magnitude of the project on which plaintiff was injured, which project involved under the construction contract between the defendant and the independent contractor the construction of 24.2 miles of new transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines, and the construction of two substations and a breaker station at a cost of $334,300.00. The construction work of a project of this magnitude is clearly the business, trade and occupation of an electrical contracting construction firm and not the trade, business and occupation of the defendant whose business is to supply and distribute electric power to its customers, within the meaning of the words "trade, business or occupation" used in their ordinary sense, as was so aptly stated by the District Judge on page 356 of the Reporter's Transcript, as follows:

> "The COURT: What bothers me about your defense is: what is the business of these people? The business of these people is selling electricity. They are not contractors to build substations."

THIRD

The conclusion of this Court that the defendant Blue Ridge constructed with its own facilities and employees three substations and was therefore engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to plaintiff's cause of action obviously was based upon the testimony of defendant's witness A. J. Hurt, manager of defendant company, who was the only

witness that testified concerning the construction of substations.

In reaching this conclusion on the basis of Mr. Hurt's testimony, this Court apparently viewed his testimony out of context, and not as a whole, and overlooked that he finally admitted that the defendant company did not construct with its own facilities any substations, or, at least, that his testimony contained self-contradictions and was evasive, consequently being susceptible to incredibility, and thus at best making the question of whether defendant constructed with its own facilities substations an issue to be passed upon by a jury, as appears from the evidence of record which shows that Mr. Hurt, although he first testified on direct and cross examination that the defendant company built with its own facilities and employees three substations, the last of which was built three years before trial at Liberty, South Carolina, on being recalled to the stand the following day for further cross examination, he changed his testimony and admitted that the substation at Liberty built three years before the trial was not constructed by defendant with its own facilities, but by Sumter Builders, an independent contractor engaged in the construction business; and he then finally admitted that none of defendant's substations was built by defendant with its own facilities, as appears from the following evidence of record.

DIRECT EXAMINATION OF A. J. HURT, MANAGER OF DEFENDANT COMPANY

(Page 134 of Appellant's Appendix.)

"Q. Does the Cooperative construct substations with its own employees?

A. Yes, sir, we have constructed sub-station.

Q. Has any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case?

A. Yes, sir, we have built sub-stations of that nature.

Q. Do you recall how many sub-stations the Co-operative has built with its own employees?

A. Yes, sir, we built three."

CROSS EXAMINATION OF A. J. HURT

(Pages 51-52 of Appellee's Appendix.)

"Q. How many sub-stations do you have?

A. We have six, sir.

• • •

Q. How long prior to the construction of this sub-station that Mr. Byrd got his arms burnt off on had it been since a substation had been constructed in behalf of the Blue Ridge **or by them?**

A. Approximately three years.

Q. Where was that one?

A. **That's at Liberty.**

Q. At Liberty?

A. Yes, sir, South Carolina.

Q. Who built that?

A. **We did, sir.**

Q. **Three years before?**

A. **Yes, sir."**

A. J. HURT RECALLED FOR CROSS EXAMINATION

(the following day)

(Pages 72-74 of Appellee's Appendix.)

"Q. Did I understand you—I mean, I understood yesterday that you testified you had six substations in the Blue Ridge set-up?

A. I think I said five or six, sir, yes, sir.

Q. Is that correct?

A. Yes.

Q. Is it five or six?

A. I would say six, sir.

Q. Will you tell me where they are?

A. They are at Liberty.

• • •

Q. You didn't build the one at Liberty, did you?

A. The station there . . .

Q. Three years ago, you didn't build that substation yourself?

A. No, sir, I didn't intend to give that impression, sir.

* * *

Q. And the substation at Liberty was built by whom?

A. The one there now, sir, I don't know who built it off-hand, sir.

Q. You don't know who built your substation at Liberty?

A. Not right now, I do not, sir.

Q. Would it refresh your recollection to name Sumter Builders? Do you recall now that they built that substation?

A. Since you mentioned it. They did some work for us, sir.

Q. I didn't ask you that. I said, **didn't they build your substation at Liberty?** You don't know whether they did or not?

A. I would say they did, yes, sir.

* * *

Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir."

The Court, in concluding that the uncontradicted evidence and only inference to be drawn from Mr. Hurt's testimony was that defendant had constructed with its own facilities and employees three substations also must have overlooked the evidence of record in the light of the colloquy between the District Judge and counsel for defendant, wherein the Judge during defendant counsel's argument in opposition to the motion to dismiss, stated that he (the Judge) understood that the witness Hurt had changed his testimony given the day previous that defendant built three substations with its own employees, as appears from the following contained in the Reporter's Transcript:

(Page 356 of Reporter's Transcript.)

"The COURT: After Mr.—the gentleman—corrected his testimony, how many substations have they built?

Mr. WALKER: They have built three, your Honor.

The COURT: **I understood he changed his testimony, that they had not built three**".

And finally, although defendant's counsel contended that Blue Ridge built with its own facilities and employees three of the six substations, the evidence of record conclusively shows that none of the six substations operated by Blue Ridge were built by Blue Ridge with its own facilities or employees, as appears from the following evidence of record:

(Page 358 of Reporter's Transcript.)

"The COURT: If they were engaged in that business, why did they go to Charlotte and hire this contractor? If they were engaged in that business, they would have done it themselves. Instead of that, they go to Charlotte and get a contractor not only to build this substation but to build others in the past.

Mr. WALKER: He testified they did it to expedite the work. Insofar as expediting the business.

The COURT: **According to your own testimony, you say they only built three and that is half of them. They owned six or seven?**

Mr. WALKER: **They have six, yes, sir.**

The COURT: According to you they built half of their substations.

Mr. WALKER: I believe one of those three has been subsequently replaced, but still they are in the business."

• • •

A. J. HURT RECALLED FOR CROSS EXAMINATION

(Page 75 of Appellee's Appendix.)

"Q. You didn't build any of the stations that you are operating now?

A. No, sir, we—no, sir.

Q. Thank you very much."

cific Mills, 193 S. C. 439, were controlling on the facts herein. In reaching this conclusion the Court must have overlooked that each of those decisions was confined to facts where the work being performed was on a facility owned by the "owner", a necessary prerequisite to make an "owner" liable under the Workmen's Compensation Act, *Miles v. West Virginia Pulp and Paper Company, supra;* and, clearly, the defendant did not own the facility on which plaintiff was working when injured. Evidently, this Court also overlooked that those decisions were confined to factual situations where each of the injured employees was performing **maintenance work** on a facility owned by the "owner", as distinguished from the work of **constructing a new facility** not yet "turned over to the owner", which was the work being performed by plaintiff at the time he was injured and lost both of his arms. Moreover, the decision of this Court in the instant case is in direct conflict and irreconcilable with the decision of this Court in *Sears, Roebuck and Company v. Wallace,* 172 Fed. (2d) 802, wherein the Court held that extensive alteration work performed by an independent contractor for another person (owner) is not part of the trade, business or occupation of such other person (owner).

The decision of this Court was predicated upon its conclusion that the cases of *Miles v. West Virginia Pulp and Paper Co.,* 212 S. C. 424, 48 S. E. (2d) 46; *Benbow v. Edmunds High School,* 220 S. C. 363, 67 S. E. (2d) 680; *Horrell v. Gulf & Valley Oil Co.,* 15 La. App. 603, 103 So. 709; *Packett v. Moretown Creamery Co.,* 91 Vt. 97, 99 A. 638, and *Wallace v. Sears Roebuck & Co.,* 4 Cir., 172 F. (2d) 802, were not applicable herein under its reasoning that in each of the cited cases the work performed by the employee of the independent contractor was not part of the **owner's** business because "the work done, **although useful** to the business, was performed in carrying on a trade or occupation **in which the owner of the business** was not engaged". In reaching this conclusion this Court must have overlooked that the facts in the cited cases are on "all fours" with those in the instant case, for here the construction work of large projects, including the construction of the

substations, performed herein, although useful to the defendant "owner's" business of supplying and distributing electricity to its customers, is a trade or occupation in which the **defendant is not engaged.** In the case at bar the only one engaged in the trade or occupation of an electrical construction contractor involving the work performed herein was Bouligny Construction Company—a trade or occupation in which the defendant Blue Ridge was clearly not engaged.

For the reasons set forth above and in the Brief filed by appellee, it is respectfully urged that a rehearing be granted, and that upon such rehearing the judgment of the District Court be affirmed, or in the alternative, the cause be remanded with directions to the District Court to grant a new trial.

Respectfully submitted,

HENRY H. EDENS,
HENRY HAMMER,
WILLIAM E. CHANDLER, JR.,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,
HENRY HAMMER,
WILLIAM E. CHANDLER, JR.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7183

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., APPELLANT,

versus

JAMES EARL BYRD, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT ANDERSON

This Court having at its October term, 1956, rendered its decision reversing the judgment of the said District Court appealed from in this cause, and the appellee having on October 31, 1956, filed a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.
November 15, 1956.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

A true copy,

Teste:

RICHARD M. F. WILLIAMS, JR.,
Clerk, U. S. Court of Appeals for
the Fourth Circuit.

DEC 5 19
JOHN T. FEY

Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON MERITS FOR PETITIONER

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Argument:

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON MERITS FOR PETITIONER

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (R. 71) is reported in 238 F. (2d) 346.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956 (R. 71). The Petition for Rehearing was denied on November 15, 1956 (R. 82). The Petition for a Writ of Certiorari was filed on December 19, 1956, and was granted on February 25, 1957 (R. 83). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law".

28 U. S. C. 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72: Workmen's Compensation, Code of Laws of South Carolina, 1952.

"Sec. 72-111. **Liability of owner to workmen of Subcontractor.**

When any person * * * referred to as 'owner' undertakes to perform or execute any work **which is part of his trade, business or occupation** and contracts with any other person (* * * referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had immediately been employed by him". (Emphasis added.)

"Sec. 72-121. **Employee's rights under Title exclude all others against employer.**

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee * * * as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-101. **When acceptance of provisions presumed.**

Every employer and employee * * * shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby * * *."

"Sec. 72-501. **Records and reports of injuries.**

Every employer shall keep a record of all injuries, fatal or otherwise, received by any of his employees in the course of their employment on blanks approved by the Commission. Within ten days after the occurrence and knowledge thereof, as provided in Section 72-301, of an injury to an employee, causing his absence from work for more than seven days, a report thereof shall be made in writing and mailed to the Commission on blanks to be procured from the Commission for this purpose.

"Such report shall contain the name, nature and location of the business of the employer and the name, age, sex, wages and occupation of the injured employee and shall state the date and hour of the accident causing injury, the nature and cause of the injury and such other information as may be required by the Commission."

QUESTIONS PRESENTED

1. May the Court of Appeals reverse the ruling of the District Judge dismissing for want of substantial evidence the affirmative defense of respondent where the evidence adduced in support of such defense is legally insufficient to sustain respondent's burden of proof?

2. Did the Court of Appeals, in reversing the ruling of the District Judge dismissing the affirmative defense, have the power also to direct entry of judgment for respondent on the issue of such defense instead of ordering a new trial where the evidence pertaining to this issue is subject to conflicting inferences and conclusions which may be drawn by reasonably minded men?

3. Did the Court of Appeals, in reversing the ruling of the District Judge dismissing the affirmative defense, have the power also to direct entry of judgment for respondent where, because of the ruling of the District Judge declared erroneous, there was no occasion in the trial of the case for the petitioner to controvert or dispute the facts of the respondent on the issue of the affirmative defense?

STATEMENT

Petitioner, James Earl Byrd, a resident of North Carolina, brought suit against respondent, Blue Ridge Rural Electric Cooperative, Inc., a South Carolina corporation engaged in the business of supplying and distributing electric power to consumers, to recover damages for negligence in causing and permitting electric current to run into a structure—a substation—in the process of construction on which petitioner was working, resulting in the loss of both forearms of petitioner, who at the time was 24 years of age, married, the father of two children and had an earning capacity of approximately $5,000.00 per year.

At the time of petitioner's injuries he was working as an employee of Bouligny Construction Company, Inc., of

Charlotte, North Carolina, an independent contracting construction firm, which, pursuant to a written contract with the respondent, was constructing a large project, including the substation involved herein, at a cost to respondent of $334,300.00 (Par. VI, Amended Answer; R. b., 60). Under this contract the substation, which during the process of construction was "under the charge and control of the Contractor" (Exhibit "C"; R. 27), was to be turned over to the respondent upon completion, and then only upon payment to the contractor of at least 90% of the contract price (Exhibit "C"; R. 28) at which time it was then to be used by respondent in the operation of its business of supplying and distributing electric power.

A short time prior to trial, respondent, pursuant to permission granted by the District Judge, amended its answer to include the affirmative defense that the work of constructing a substation being done by the independent contractor was part of respondent's business and hence the South Carolina Workmen's Compensation Act, Sections 72-111 and 72-121 (*supra*, page 2), was a complete bar to petitioner's action herein. (Paragraph VII—Amended Answer; R. c).

Respondent's affirmative defense that the work of constructing substations being performed by the independent building contractor was part of its business required proof (1) that such work otherwise is ordinarily and appropriately performed by the direct employees of respondent with its own facilities "in the promotion of its ordinary and usual business", and (2) that the subject matter of the work, to wit, the uncompleted structure (substation) being constructed by the independent contractor, was owned by respondent at the time of petitioner's injuries.

At the trial of this case, respondent sought to meet its first requirement of proof that its direct employees ordinarily and appropriately perform the work of constructing

substations in the promotion of its normal and usual business, solely by the testimony of its manager, A. J. Hurt, who, on depositions taken prior to trial, professed to have little, if any, knowledge concerning the manual work performed by respondent's employees or the nature of the work involved in the construction o. a substation (R. 13, 36, 40); he also stated on deposition that respondent, Blue Ridge, made no investigation of the occurrence resulting in petitioner's injuries because the substation did not belong to respondent and the injuries were not sustained by "one of our men" (R. 13, 14, 78, 79), an investigation which respondent would have been compelled to make in order to file the first report of injury required under Section 72-501, South Carolina Code, 1952, *supra*, page 3, if the Workmen's Compensation Act had been applicable herein.

Nevertheless, Mr. Hurt took the stand and testified on direct examination and part of cross examination that respondent built with its own employees and facilities three of its six substations (R. 31, 40, 75), the last of which, he stated, was built with its own employees at Liberty, South Carolina, three years prior to petitioner's injuries. (R. 38, 76). On the following day, however, when the witness Hurt was recalled to the stand for further cross examination and confronted with evidence that his testimony would be contradicted by undisputed facts, he recanted, changed and corrected his testimony given the previous day by stating that the respondent not only did not build with its own facilities and employees the substation at Liberty, South Carolina (R. 41, 42, 76), but also that it did not build with its own facilities and employees any of its six substations (R. 42, 77); and that Hurt had changed and corrected this material testimony was so understood by the trial judge (R. 50, 77). The testimony of Hurt viewed in its entirety was also equivocal and evasive (R. 15-18, 38, 39, 76, 77). The record was barren of other evidence that the

employees of respondent ordinarily and appropriately perform the work of constructing substations.

As to respondent's second requirement of proof, the record was devoid of any evidence that the subject matter of the work being performed by the independent contractor was owned by the respondent. On the contrary, it affirmatively showed that the respondent neither owned, possessed nor controlled the substation, the subject matter of the work being performed by the independent contractor at the time of petitioner's injuries. (Par: IV, Amended Answer; R. b. 10, 14, 19.)

At the conclusion of respondent's case and before petitioner's case in reply, petitioner, testing the legal sufficiency of respondent's evidence, moved to dismiss this defense (R. 48, 49, 73). The District Judge granted the motion (R. 52, 73) and, thereupon, there being no occasion to offer any reply evidence on the issue of the affirmative defense, the petitioner offered none and closed his case (R. 52, 73), following which respondent also closed its case.

At the close of the entire case, respondent moved for a directed verdict on the ground, *inter alia*, of its affirmative defense which had already been dismissed by the Trial Judge. This motion was denied (R. 54) and the case was submitted to the jury on the sole issues of negligence and contributory negligence.

The jury brought in a verdict of $126,786.80 in favor of petitioner. Upon consideration of respondent's motion for judgment n. o. v. or for a new trial made upon the ground of its affirmative defense, the District Judge denied same. Accordingly, judgment for the amount of the verdict was thereupon duly entered, from which the respondent appealed to the Court below.

On appeal, the Court below reached a factual finding, based upon the witness Hurt's testimony given prior to its repudiation, that respondent built three substations with

its own facilities and employees which the Court below held conclusively supported respondent's theory and defense that respondent was not only engaged in the business of supplying and distributing electricity, but also in the business of constructing substations, thus making the Workmen's Compensation Act applicable as a defense. The Court, therefore, reversed the District Court's judgment.

The Court below did not stop there, however. It determined that the testimony on this issue was uncontradicted, judged it as credible and concluded that respondent as a matter of law was in the business of constructing substations at the time of petitioner's injuries and hence the South Carolina Workmen's Compensation Act operated as a complete bar to petitioner's action herein. The Court below, therefore, remanded the case with direction to enter judgment for respondent without any discussion in its otherwise detailed opinion of the propriety of this direction. Petition for Rehearing was filed requesting, at the least, that the judgment be modified to direct a new trial (R. 72), but was denied by the Court below on November 15, 1956 (R. 82).

SUMMARY OF ARGUMENT

I

A. The reversal by the Court below of the District Court's dismissal of the affirmative defense is in direct conflict with the decision in *Galloway v. U. S.*, 319 U. S. 372, wherein this Court, at pages 379-380, in testing the legal sufficiency of evidence necessary to sustain a party's burden of proof, applied the standard of refusing to give legal efficacy or probative value to testimony of a witness who corrects, changes, recants and repudiates such testimony on the witness stand. This standard of testing the legal sufficiency of evidence is applied also by the South Carolina

Supreme Court, *Critzer v. Kerlin*, ... S. C. ....., 98 S. E. (2d) 761, 762-763; *McDowell v. Stilley Plywood Co.*, 210 S. C. 173, 41 S. E. (2d) 872, 874-875.

In applying this standard in the *Galloway case*, at page 395, this Court very clearly enunicated the applicable principle that "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked".

B. Judged by the foregoing standard and the corollary principle applied in *Galloway v. U. S.*, *supra*, it is clear that respondent's affirmative defense was not supported by substantial evidence.

The Court below in reversing, contrary to the applicable standard of both this Court and the South Carolina Supreme Court in testing the legal sufficiency of evidence, applied the standard of segregating a portion of the testimony of a witness from the whole of his testimony and giving probative value to such portion despite the fact that it was corrected, changed, recanted and repudiated by the rest of the testimony of such witness. Succinctly stated, it gave probative value to self-repudiated, as distinguished from self-contradictory, testimony of a witness.

Respondent's affirmative defense that the work of constructing substations being performed by the independent contractor was part of respondent's business and hence the Workmen's Compensation Act operated as a complete bar to petitioner's action required, in accordance with both the general and South Carolina law, proof that (1) such work is "ordinarily and appropriately" performed by the "direct employees" of respondent with its own facilities "in the promotion of its ordinary and usual business", *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, *Sears Roebuck v. Wallace* (C. A. 4), 172 F. (2d) 802, 809-810; *Shafer v. Southwestern Bell Tel.*

Co. (Mo.), 295 S. W. (2d) 109, and (2) the subject matter of the work performed by the independent contractor, that is, the substation being constructed by the independent contractor, was owned by the respondent at the time of petitioner's injuries, *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 32.

Respondent, recognizing its first requirement of proof, sought to establish that its direct employees ordinarily and appropriately perform the work of constructing substations; however, as to its second requirement of proof, the record is not only barren of evidence that the substation, the subject matter of the work, was owned by the respondent at the time of petitioner's injuries, but it affirmatively shows that the substation was neither owned, possessed nor controlled by the respondent at such time.

The only testimony tending to support the respondent's burden of proof that its direct employees ordinarily and appropriately perform the work of constructing substations with its own facilities was given by the witness, respondent's manager A. J. Hurt. He testified on direct examination that respondent constructed three substations with its own employees and facilities, but as pointed out in the Statement, *supra*, this testimony was changed, corrected, recanted and repudiated by the witness, and thus, in accordance with the applicable standard of this Court in testing the legal sufficiency of evidence, lost its probative value.

The record is void of any other evidence that respondent's direct employees ordinarily and appropriately perform or have ever performed the work of constructing substations. On the contrary, according to respondent's witness Edward Vincent McMahon, the direct employees of the respondent ordinarily and appropriately perform the every day, recurrent work of stringing wires from the existing lines of respondent's company to the homes of new con-

sumers in order to make service connections and also perform the recurrent work of maintaining equipment in substations already in operation, as distinguished from constructing substations to be used by respondent upon completion. Also, the construction contract between respondent and the independent contractor, introduced in evidence by respondent, instead of supporting respondent's theory, proves the contrary; it calls for all of the work, including the construction of the substations, to be performed not with the facilities and by the direct employees of respondent but with the facilities and by the employees of the independent building contractor, which under the specific terms of the contract, was in "charge and control" of the work. In fact, it is undisputed that respondent "had nothing to do with the substation" until completion except its duty to exercise due care for the safety of persons working in the vicinity of its existing lines. And in attempting to exercise this duty, respondent assigned one of its employees, Ira Moss, to de-energize certain lines each day in the morning before commencement of work by the independent contractor and to re-energize such lines at the close of day. It was the negligence of this employee in causing current to run into a newly constructed line leading from the substation that caused petitioner's injuries.

Respondent, in support of its claim, placed some reliance upon the statute under which it was organized by which it was empowered to construct substations. But the evidence is clear that respondent's direct employees ordinarily and appropriately do not and have never performed such work either occasionally or in the usual course of respondent's business. And in the absence of such evidence, it is manifest that the statute alone is not sufficient to support respondent's affirmative defense. *Vermillion v. Woman's College of Due West*, 104 S. C. 197; 88 S. E. 649; *White v. Central Dispensary*, 99 F. (2d) 355. To hold otherwise would require

a construction of the pertinent provisions of the Workmen's Compensation Act far different than its plain wording, a construction that would extend the liability of "owners" to work which they are **empowered** to perform, instead of limiting their liability, as the provision unequivocally states, to work which **is** part of the owners' trade or business, and would render them liable for the payment of compensation benefits to employees of independent contractors under all circumstances, save the exceptional one where the contract with the independent contractor would be *ultra vires* as to corporations and illegal or prohibited by law as to individuals.

Thus, the Court below, in reaching its crucial factual finding that respondent's company constructed three substations with its own facilities and direct employees, ignored and disregarded the applicable standard of both this Court and the South Carolina Supreme Court in testing the sufficiency of one's evidence; instead, in direct violation of such standard and contrary to the teaching of *Galloway v. U. S., supra*, it viewed testimony out of context and applied the standard of giving probative value and legal efficacy to the self-corrected and self-repudiated testimony of a witness for a party having the burden of proof.

And in the absence of the required proof that respondent owned the substation, which was the subject matter of the work of the independent contractor at the time of the petitioner's injuries, the reversal by the Court below was contrary to applicable state law and in direct violation of the principle enunciated by this Court in *Galloway v. U. S., supra*, that "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring" respondent's affirmative defense.

If respondent's employees ordinarily and appropriately performed the work of constructing substations with its

own facilities, respondent company records would have reflected such activities and could have been produced. Evidence of such crucial facts would have also been within the peculiar knowledge and possession of the employees of respondent who allegedly construct or have constructed its substations, including its "construction superintendent", Mr. Porter (R. 44). Respondent deliberately chose to withhold or not to produce its records nor present as witnesses its "Construction superintendent" or any of its employees who were in a position to supply the gap of crucial proof. Instead, it chose to rely upon judicial laxity which is not permitted to "bridge the canyon", *Galloway v. U. S., supra;* and particularly applicable is the language of Mr. Justice Rutledge wherein he states, "such practice does not require that * * * the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has evidence of them in his peculiar knowledge and possession, but elects to keep it so". Consequently, the trial judge was not only authorized, but was under a duty, to dismiss respondent's affirmative defense.

C. Moreover, the decision of the Court below, in reversing the ruling of the District Judge dismissing the affirmative defense, was contrary to the South Carolina law. The common law remedy of an employee of an independent contractor against an "owner" is barred by the provisions of the South Carolina Workmen's Compensation Act only if the "owner" is liable for compensation benefits to the injured employee. But under the provisions of the Act involved herein, as pointed out in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 32, to render an "owner" liable for compensation benefits, it is prerequisite that the subject matter of the work be owned by the "owner". It is clear, however, from the record that the substation was neither owned, possessed nor controlled by respondent at the time of petitioner's injuries. In fact, until

completion and acceptance, respondent "wasn't supposed to have anything to do with that substation".

Also, where the work of an independent contractor involves the construction of a facility to be turned over to and used by the owner upon completion, as distinguished from the recurrent and periodic work of maintaining a facility in operation, such work is not the "trade, business or occupation" of the "owner" within the meaning of the Workmen's Compensation Act, so as to render him liable for compensation benefits. *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 33; *Sears Roebuck & Co. v. Wallace* (C. A. 4), 172 F. (2d) 802, 809; 150 A. L. R. 1210, 1226. Compare *Tucker v. Texas Oil Co.* (C. A. 5), 203 F. (2d) 918.

Additionally, assuming for the sake of argument that the work of the independent contractor in constructing substations may be part of the respondent's business, the dismissal of the affirmative defense herein is nevertheless supported by the reasoning in the South Carolina case of *Ballard v. Southern Cotton Oil Co.*, 145 F. Supp. 882; a case factually similar to the case *sub judice*, decided after the trial of the instant case. There, the District Judge of the Eastern District of South Carolina held that a person referred to as an "owner" secondarily liable under the Act who, because of coverage provided for by the independent contractor primarily liable, does not come within the Act to bear its liability, is not entitled "to be accorded its immunities". And, so likewise in the instant case, since the respondent did not come within the Act to bear its liability, it should not now be permitted to claim its immunities.

For the foregoing reasons it is respectfully submitted that the reversal by the Court below of the District Court's dismissal of the affirmative defense was erroneous.

II

A. Assuming, *arguendo*, that the evidence in support of respondent's affirmative defense was legally sufficient, the decision of the Court below in remanding with direction to enter judgment for respondent on its affirmative defense was contrary to the applicable decisions of this Court. It is firmly established that it would be an undue invasion of the jury's historic function for an appellate court to judge the credibility of witnesses and weigh the conflicting inferences and conclusions that may be drawn from the evidence. *Wilkerson v. McCarthy*, 336 U. S. 53; *Lavender v. Kurn*, 327 U. S. 645.

It is also well settled that the testimony of a witness, even if not contradicted by adverse testimony of other witnesses, raises an issue of credibility for a jury to determine where the witness has an interest in the outcome of the case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, his testimony is self-contradictory, evasive, equivocal, clouded with uncertainties and generalities, or his manner of testifying gives rise to doubts of his sincerity, *Quock Ting v. U. S.*, 140 U. S. 417, 20 Am. Jur. page 1030, Section 1180 *et seq.*

B. The Court below relied upon the testimony of respondent's manager A. J. Hurt that respondent constructed substations with its own employees and facilities, despite his subsequent retraction and change of testimony, as conclusive that respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to petitioner's action herein.

Reference to the record manifests, however, that the credibility of the witness Hurt became an issue determinable by a jury; also, that respondent was not in the business of constructing substations at the time of petitioner's in-

juries, if indeed it was ever in such business, in view of Hurt's testimony that respondent had not constructed any of its substations with its own facilities and employees. At the least, the evidence was subject to conflicting inferences and conclusions. Thus, the action of the Court below constituted an invasion of the province of the jury.

The evidence of record shows (1) that respondent had six substations (R. 40, 76); (2) that on direct and cross examination respondent company's manager, A. J. Hurt, testified that three of the substations were constructed with respondent's own facilities and employees, the last of which was constructed at Liberty, South Carolina, three years prior to petitioner's injuries (R. 31, 38, 75, 76); (3) that on being recalled to the stand for further cross examination the following day, Mr. Hurt stated that respondent did not use its own facilities and employees to construct its substation at Liberty, South Carolina, built three years prior to petitioner's injuries, but that the work was done by an independent contracting construction firm engaged in the business of constructing substations (R. 42, 76, 77); (4) that Mr. Hurt finally testified that respondent did not use its facilities or employees to build any of its six substations (R. 42, 77); (5) that Mr. Hurt's testimony was equivocal and evasive (R. 15-18, 38, 39, 76, 77); (6) that he refused to answer a material question propounded by petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might subject the witness to contempt of court (R. 15-18); and (7) that Mr. Hurt's testimony on depositions taken before trial was in direct conflict with the knowledge he professed to have about material facts to which he testified at the trial (R. 13, 36, 40).

Thus, ever assuming that respondent's evidence was legally sufficient, the action of the Court below in directing entry of judgment for respondent was clearly erroneous.

III

It appears from the record that respondent's affirmative defense was dismissed before petitioner's case in reply. Therefore, there was no occasion for petitioner to present reply testimony, and, accordingly, none was presented. Under such circumstances, the action of the Court below was in direct conflict with the decisions of this Court in *Weade v. Dickmann, Wright & Pugh*, 337 U. S. 801; *Fountain v. Wilson*, 336 U. S. 681; and *Kuku Nagano v. McGrath*, 342 U. S. 916, in which it was held that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits by directing judgment against him when such party had no occasion to dispute or controvert the material facts because of the ruling of the District Judge declared erroneous.

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of the opponent's case in the trial court. It would, contrary to the spirit of the Federal Rules of Civil Procedure, discourage mid-trial attacks and consequently add to the time and expense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the U. S. Constitution which is impartial in its guarantee of both the right of trial by jury and the right to challenge the legal sufficiency of an opponent's case.

The decision of the Court below is not an "appropriate" judgment which was "just" under the circumstances and therefore not authorized by 28 U. S. C. 2106, *Bryan v. U. S.*, 338 U. S. 552.

ARGUMENT

I

An affirmative defense should be dismissed for want of substantial evidence where a defendant has the opportunity and occasion to produce evidence in support of such defense, but the evidence produced thereon is such that, in accordance with the standard and principles applicable in testing the legal sufficiency of one's evidence, a finding cannot properly be made for the defendant upon whom the onus of proof is imposed.

The Court below undertook to reverse the ruling of the District Court dismissing for want of substantial evidence the affirmative defense of respondent, under the assumption that the respondent constructs substations with its own employees and facilities and therefore is engaged in the business of constructing substations.

Petitioner challenges both the right and assumption of the Court below. He submits that not only was the action of the Court below inconsistent with applicable federal law that an affirmative defense which is not supported by substantial evidence should be dismissed but also that there was no evidence of record upon which the affirmative defense could be supported. Petitioner also submits that the reversal by the Court below was in conflict with the applicable State law.

A. **The Court below was without power or right to reverse the dismissal of the affirmative defense which according to applicable standards and principles was not supported by substantial evidence of record.**

It has long been the established rule in the federal courts that "before evidence may be left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party

producing it, upon whom the onus of proof is imposed." "A mere scintilla of evidence is not enough to require the submission of an issue to the jury."

Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780;
Gunning v. Cooley, 281 U. S. 90, 94;
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333;
Brady v. Southern R. Co., 320 U. S. 476, 479.

Directly on point herein is the standard applicable in testing the legal sufficiency of evidence that the testimony of a witness for a party having the affirmative of proof should be considered as a whole, and when so considered, neither probative value nor legal efficacy should be given to the testimony of the witness which is corrected, changed, recanted and repudiated by the witness on the stand.

Galloway v. U. S., 319 U. S. 372, 379-380;
Critzer v. Kerlin, ... S. C. ..., 98 S. E. (2d) 761, 762-763;
McDowell v. Stilley Plywood Co., 210 S. C. 173, 41 S. E. (2d) 872, 874-875.

The application of this standard promotes the administration of justice. To apply a different standard would encourage litigants to give false testimony in order to avoid dismissals and directed verdicts against them and at the same time would permit such litigants to purge themselves of the offense and avoid punishment therefor by changing, correcting and recanting such testimony on the witness stand.

A corollary of the application of this standard is the well established principle that "there is an essential requirement that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked". And where a party having the burden of proving the affirmative of an issue has the occasion

and the opportunity to produce evidence thereon, but the evidence produced is legally insufficient to support his burden of proof, such issue should be withdrawn from the case.

Galloway v. U. S., 319 U. S. 372, 395.

B. There was no substantial evidence in support of respondent's requirement of proof that respondent's direct employees ordinarily and appropriately perform the work of constructing substations to establish that it was in the business of constructing substations at the time of petitioner's injuries, if indeed it ever was in such business.

It is respectfully submitted that, on the basis of the record in this case, it was the duty of the District Judge to dismiss the affirmative defense.

Respondent's affirmative defense, that the work of constructing substations being performed by the independent contractor was part of respondent's business and hence the South Carolina Workmen's Compensation Act operated as a complete bar to petitioner's action, required for its establishment (1) proof that the work of constructing substations being performed by the independent contractor is work "ordinarily and appropriately" performed by the "direct employees" of respondent with its own facilities "in the promotion of its ordinary and usual business", *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33; *Sears Roebuck & Co. v. Wallace* (C. A. 4), 172 F. (2d) 802, 810; *Shafer v. Southwestern Bell Tel. Co.* (Mo.), 295 S. W. (2d) 109; and (2) proof, as pointed out in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 438, 48 S. E. (2d) 26, 32, that the subject matter of the work, that is, the uncompleted structure or substation being constructed by the independent contractor, was owned by respondent at the time of petitioner's injuries.

The record shows that respondent's first requirement of proof that its direct employees ordinarily and appropriately perform the work of constructing substations in

the promotion of its normal and usual business rested solely upon the self-repudiated and self-corrected, as distinguished from self-contradictory, testimony of respondent's manager that the respondent constructed three substations with its own employees; and as to its second requirement of proof the record was devoid of any evidence that respondent owned the subject matter of the work being performed by the independent contractor, that is, the uncompleted structure or substation which was being constructed by the independent contractor at the time of petitioner's injuries; to all of which we refer with more particularity below to demonstrate the lack of substantial evidence offered by respondent in support of its affirmative defense.

(1) **The testimony of respondent's manager, A. J. Hurt:** Respondent, recognizing its first requirement of proof, sought to establish that its direct employees ordinarily and appropriately perform the work of constructing substations solely by the testimony of its manager, A. J. Hurt, who on deposition prior to trial professed to have little, if any, knowledge concerning the manual work performed by employees of respondent's company or the nature of work involved in the construction of a substation; he also stated on deposition that respondent company did not make an investigation of the facts and circumstances surrounding petitioner's injuries because petitioner was not an employee of respondent (R. 13) and the substation was not owned by respondent at the time of petitioner's injuries (R. 14), an investigation that respondent would have been compelled to make if the Workmen's Compensation Act had been applicable.

Nevertheless, at the trial of the case, Mr. Hurt testified that respondent constructed with its direct employees and facilities three of its six substations, the last of which he stated was built with its direct employees three years prior to petitioner's injuries. Admittedly, this was strong testi-

mony tending to create a factual question on the issue of whether respondent's direct employees ordinarily and appropriately perform the work of constructing substations.

However, the following day when the witness Hurt was recalled to the stand for further cross examination, he changed, corrected, recanted and repudiated this testimony and thus destroyed all of its probative value by stating that the work of constructing the substation at Liberty, South Carolina, was not performed by the direct employees of respondent and finally admitting that respondent did not construct any of its six substations with its direct employees and own facilities (R. 42, 76, 77).

(2) **The testimony of Edward Vincent McMahon**: The only other testimony touching upon the work ordinarily and appropriately performed by the employees of respondent's company was given by respondent's witness, Edward Vincent McMahon, an employee of Southern Engineers, an electrical engineering firm of Georgia, engaged under a separate contract with respondent as an independent contractor to perform the engineering services and to inspect, test and approve the work of the independent building contractor to assure compliance with the plans and specifications.

This witness significantly enough did not testify that respondent's direct employees ordinarily and appropriately perform or have ever performed the work of constructing substations. On the contrary, he testified that they performed the construction work of stringing lines from respondent's existing system to homes of new consumers in order to make service connections (R. 45) and the everyday, recurrent work of maintaining the equipment in respondent's substations already in operation, such as "resetting breakers, reworking damaged equipment and/or supervising it and resetting existing regulators" (R. 45), and that respondent, "Blue Ridge Electric Cooperative also finds its

necessary at many times to 'heavy up', as we call it, their existing system in order to be able to carry additional power loads that they might develop on their system". (R. 45). He also testified that until the substation involved herein was completed, turned over to respondent and accepted by it, respondent "wasn't supposed to have anything to do with that substation" (R. 47).

(3) **Exhibit "C", the construction contract between respondent and Bouligny Construction Company, the independent building contractor:** This exhibit shows that a written contract was awarded to Bouligny Construction Company, Inc., pursuant to a bid submitted by Bouligny to the respondent, (Exhibit "C"; R. 23). This contract called for Bouligny Construction Company to construct "approximately 24.2 miles of new electric transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines and the construction of two substations and a breaker station" (R. 56), at a cost to the respondent of the sum of $334,300.00. The substations, which during the process of construction were "under the charge and control" of Bouligny Construction Company (Exhibit "C"; R. 27), were to be turned over to respondent upon completion, and then only upon payment of at least 90% of the contract price (Exhibit "C"; R. 28), at which time such substations were to be used by respondent in the operation of its business of supplying and distributing electric power. The project, including the substation, during the course of construction until completion, was "under the charge and control of the contractor" (Exhibit "C"; R. 27) subject to inspection, tests and approval by another independent contractor, an electrical engineering firm, to assure compliance with the plans and specifications; until then respondent had nothing to do with it (R. 10, 14, 47), except its duty to exercise due care toward employees of the independent contractor working in the vicinity of

its existing lines by assigning one of its employees, Ira Moss, to de-energize such existing lines each day prior to the commencement of the construction work and to re-energize such lines at the close of the day.

It is thus clear that respondent's direct employees performed no construction work under the contract. Bouligny Construction Company was employed as an independent contractor to construct the project, which because of its magnitude and because respondent was not capable of handling the building of same as part of its normal and usual business, could not and would not ordinarily and appropriately be constructed or built by respondent's own employees in the usual course or as a part of respondent's business. In fact, the construction work of a project of this magnitude, if attempted to be performed by the employees of respondent as part of its normal and usual business would interrupt, interfere and hinder rather than promote the operation of respondent's usual business. It is work which could be performed only by an independent contracting construction firm set up with the proper facilities and trained employees to perform such work, as was done in the case *sub judice*.

(4) **The Statute under which respondent company was organized:** Some reference was made by respondent, in support of its claim, to the Statute under which respondent was organized which confers upon it the power to construct substations.

It is clear, however, that a Statute relative to powers conferred upon corporations does not, in the absence of evidence as to the exercise of such powers and the actual operations of a corporation organized under such Statute, furnish proof that such corporation ordinarily and appropriately exercises any of such powers through its direct employees in the prosecution of such business. *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 88 S. E.

649; *White v. Central Dispensary*, 99 F. (2d) 355. The logic of this reasoning becomes even more apparent when we consider that the fact that an individual has the legal right or power, with certain exceptions, to engage in many different businesses and perform many types of work is not proof that such individual is in each or any of such businesses, or that each or any type of such work is part of his business, in the absence of evidence as to his actual operations showing the particular work or business in which he is engaged. Similarly, the mere fact that a corporation is empowered to engage in a particular work or business does not prove that it is actually engaged in such work or business.

Under respondent's reasoning, the provisions of the South Carolina Workmen's Compensation Act involved herein, Section 72-111, would have to be construed as extending the liability of "owners" for the payment of compensation benefits to work which individual and corporate "owners" have a right or are empowered to perform, rather than limiting their liability, as the section involved herein unequivocably states, to employees of contractors performing work "which is part of" such corporation's or individual's "trade, business or occupation". The quoted language of the Statute when used in "this ordinary sense and acceptation" connotes work which ordinarily and appropriately would be performed with some degree of constancy, frequency or regularity by the direct employees of the principal employer. *Benbow v. Edmunds High School*, 220 S. C. 363, 371, 372, 67 S. E. (2d) 680, 683, 684.

Such a construction of the provision of the Act involved herein is not only unwarranted, but there is no logical basis for it. The chief purpose of this provision is "to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do through direct employees." *Benbow v. Edmunds*

High School, 220 S. C. 363, 372; 67 S. E. (2d) 680, 684; *Marchbanks v. Duke Power Company*, 190 S. C. 336, 342, 2 S. E. (2d) 827; *Sears Roebuck v. Wallace* (C. A.), 172 F. (2d) 802, 810. It is not the purpose of this provision of the Act to make the employer liable for compensation benefits to employees of independent contractors for injuries sustained in performing the work of building a structure—a facility which upon completion may be necessary in the operation of a business; work which the principal employer is empowered to have performed by independent contractors, as distinguished from work which is ordinarily and appropriately performed by "direct employees" of an owner "in the promotion of his ordinary and usual business". *Sears Roebuck v. Wallace*, 172 F. (2d) 802, 809; *Miles v. W. Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. C. (2d) 26.

From the foregoing review of the record it is manifest that, with the exception of Mr. Hurt's testimony which was corrected and repudiated by him, the record is barren of evidence that respondent's direct employees ordinarily and appropriately perform the work of constructing substations.

Consequently, the crucial factual finding of the Court below that respondent constructed three substations with its own facilities and employees, and hence respondent had met its first requirement of proof, rested solely upon Hurt's testimony taken out of context. In reaching this finding the Court below did not follow the applicable standard of both this Court and the South Carolina Supreme Court in testing the legal sufficiency of evidence; instead, in disregard and in direct violation of such standard, it gave probative value and legal efficacy to testimony of respondent's manager, A. J. Hurt, who changed, corrected, recanted and repudiated such testimony on the witness stand prior to the completion of his examination.

If respondent's employees ordinarily and appropriately construct or have constructed substations, knowledge of such activities was within the peculiar possession of respondent through its company records reflecting its activities. Evidence of such crucial facts was also within the peculiar knowledge and possession of respondent's own employees who allegedly construct or have constructed substations. It was respondent's burden under its affirmative defense to show that its direct employees ordinarily and appropriately construct substations. Respondent, however, deliberately chose, for reasons best known to itself, to withhold or not to produce its records nor present the testimony of such employees who were in a position to best supply the gap of crucial proof, which judicial laxity is not permitted to bridge. *Galloway v. U. S.*, 319 U. S. 372, 386, 387. The instant case, therefore, is controlled by *Galloway v. U. S., supra,* in which this Court held that a party having the onus of proof does not establish his case where he has within his peculiar knowledge and possession evidence of crucial facts which he fails to produce but relies instead upon inferences to be drawn by a jury from the withholding of such evidence. As stated in the opinion by Mr. Justice Rutledge, such practice "does not require that * * * the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has the evidence of them in his peculiar knowledge and possession, but elects to keep it so."

We are not unmindful of the language of Mr. Justice Murphy in *Lavender v. Kurn*, 327 U. S. 645, that a measure of speculation and conjecture is required on the part of the jury in practically every case, but only under circumstances "whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences". None of such circumstances is present in the instant case. Here the evidence in support of respondent's affirma-

tive defense was much weaker and clearly did not rise to the dignity of the evidence which this Court held legally insufficient to support the onus of proof imposed upon the party producing the evidence in the *Galloway case*. Thus, it became the duty of the District Judge in accordance with applicable federal law to dismiss respondent's affirmative defense.

C. The record is void of the evidence required by South Carolina law to render applicable the Workmen's Compensation Act as a defense.

The record is void of any evidence to support respondent's second requirement of proof that the substation, the subject matter of the work being performed by the independent contractor, was owned by respondent at the time of petitioner's injuries. In fact, it conclusively appears from the pleadings (Par. IV, Amended Answer; R. b), respondent's answers to interrogatories (R. 18-20), and the other evidence of record (R. 14, 42, 47), that the substation under construction on which petitioner lost both forearms was neither owned, controlled nor possessed by respondent at the time of petitioner's injuries and that respondent had no interest or concern in the work performed by petitioner on the substation during the course of its construction (R. 13). Therefore, the reversal by the Court below was in direct conflict with the principle enunciated by the Court in *Galloway v. U. S., supra.*

Under applicable South Carolina law, as pointed out in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 437, 48 S. E. (2d) 26, 32, in order to render an "owner" liable for payment of compensation benefits to an injured employee of an independent contractor it is a necessary prerequisite that the subject matter of the work performed by the independent contractor be **owned** by the "owner". The South Carolina Supreme Court made it clear in the cited case that in other South Carolina cases where persons re-

ferred to as "owners" were held liable for compensation benefits to injured employees of independent contractors, the subject matter of the work being performed by the independent contractor was **owned** by the "owner", and the Court was careful to point out this distinguishing feature in rejecting the application of the Act to the facts in the cited case, as follows:

> "In all three cases just cited, the timber cut and transported to the employer's manufacturing plants **was the property of the employer,** which is in significant contrast to the facts in this case. Here there was **no ownership** by the defendant of the timber or the harvested pulpwood prior to the delivery of the latter to the railroad company for transportation to the defendant." (Emphasis added.)

So, likewise, as appears from the opinion of the Court below in the instant case, "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days" (R. 57).

The Court below, in reversing, relied upon the South Carolina cases of *Marchbanks v. Duke Power Company*, 190 S. C. 336, 2 S. E. (2d) 825 and *Boseman v. Pacific Mills*, 193 S. C. 479, 8 S. E. (2d) 878, in both of which the facts are distinguishable from those in the instant case, and therefore not controlling herein. In each of the cited cases it is clear that (1) the contractor was engaged to perform **maintenance** work required to be performed periodically and recurrently in order to carry on and continue the business of the owner, no matter how large, small, static or progressive such business might be, and (2) that such work was performed on a facility **owned** by the defendant. Such facts are in significant contrast to the facts herein that the work being performed by the independent contractor at the time of petitioner's injuries was the non-periodic and non-recurrent work of constructing a new facility to be turned

over to the respondent upon completion and that the subject matter of the work was not owned by respondent at the time of petitioner's injuries. Compare *Tucker v. Texas Oil Co.* (C. A. 5), 203 F. (2d) 918, 923, 924. Such work of constructing a facility to be turned over to and used by an owner upon completion in the operation of his business, in accordance with the reasoning of the South Carolina Supreme Court in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, and the decisions of the majority of other jurisdictions as indicated in the annotation contained in 150 A. L. R. 1210, 1226, does not constitute the "trade, business or occupation of the owner".

Particularly applicable to the work involved herein is the reasoning of Mr. Justice Stukes, now Chief Justice of the South Carolina Supreme Court, in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, quoting with approval from the language of the Georgia Court of Appeals in *Huiet, Commissioner v. Brunswick Pulp & Paper Co.*, 74 Ga. App. 355, 39 S. E. (2d) 545, as follows:

> "The mere fact that a commodity is essential and necessary in the operation of a business **does not mean that the supplying of it is part of the business.** It may be admitted that pulpwood is a commodity essential to the operation of the defendant's business, but it does not necessarily follow that **the work of supplying the mill with pulpwood is part of the usual business operated by the defendant.**" (Emphasis supplied.)

Applying the reasoning of the foregoing quotation, it is respectfully submitted that the mere fact that a substation is a facility which upon completion may be essential and necessary in the operation of respondent's business does not mean that the work of constructing such substation is part of the respondent's business. The reasoning of the South Carolina Supreme Court in the *Miles case* applies with equal force to the facts in the instant case. Compare

Glidden Rural Electric Cooperative v. Iowa Employment Security Commission (Iowa), 20 N. W. (2d) 435, where the Court held that work of an independent contractor in constructing lines was not part of the business of the cooperative.

The ruling of the Chief Judge of the District Court for the Western District of South Carolina, Honorable C. C. Wyche, involved a question of local substantive law of South Carolina. His ruling was in accord with correct principles of law and in consonance with the reasoning of the South Carolina Supreme Court in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, wherein the Court cited with approval a Wisconsin case in which a lumber company that did not do its own logging was held not liable for compensation benefits to an injured employee of an independent contractor, a farmer, who was engaged to do the logging operations for the lumber company, upon the basis that the services of the independent contractor were not in "promotion of its ordinary and usual business such as would otherwise be performed directly through its employees * * *". The District Judge's ruling was also in accord with the philosophy announced in the decisions of the South Carolina Supreme Court and enunciated by the Court of Appeals for the Fourth Circuit in its prior case, *Sears Roebuck v. Wallace*, 172 F. (2d) 802, a case on which Judge Wyche sat as a member of the Court of Appeals. No reason was stated in the opinion of the Court below for not applying the controlling principles of the *Sears case* in which it was held that the work of making alterations by an independent contractor in a storage warehouse of the owner was not the business of the owner, except the brief passing remark that the *Sears case* was distinguishable from the instant case "on the ground that the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not

engaged". It is clear, however, from a reading of both decisions and the record herein that the facts in the instant case are much stronger than those in the *Sears case* to warrant the exclusion of the Workmen's Compensation Act as a defense and that the decision of the Court below in the case at bar is in direct conflict and irreconcilable with the *Sears, case,* both on the law and the facts.

The Court below, not having among its members a South Carolina lawyer, in reversing the action of the Chief District Judge, contrary to the accepted and usual course of judicial review, did not give weight to the judgment of the District Judge on a question of local law of a state in which the District Judge was an outstanding and able lawyer of long experience who had served in the South Carolina legislature and had sat as an acting Associate Justice of the State Supreme Court. *Bernhardt v. Polygraphic Company of America,* 350 U. S. 198; *Standard Brands v. Bateman* (C. A. 8), 184 F. (2d) 1002, cert. den., 340 U. S. 942. Appellate courts should be slow to impute to trial courts a want of perspicacity in determining the local law, and, as stated in headnote 1 *Nordin v. May* (C. A. 8), 208 F. (2d) 131, "where question to be determined involved application of state law, which, at best, was at least uncertain on the subject, Court of Appeals on appeal would defer to judgment of Federal District Court concerning the state law."

Even assuming that the work of constructing substations was the business of respondent, the dismissal of respondent's affirmative defense is also supported by the opinion in *Ballard v. Southern Cotton Oil Co.* (S. C. 1956), 145 F. Supp. 882, a case factually similar to the instant case, which was decided subsequent to the trial of the case *sub judice* but before it reached the Court below on appeal. The *Ballard case* holds that an employee of an independent contractor may maintain a common law action against an

"owner" **secondarily** liable who does not come within the Act to bear its liabilities because of the coverage provided for under the Act by the independent contractor primarily liable. And that an "owner" under the Act involved herein, Section 72-111, is "secondarily" liable is clear from the language in *Younginer v. J. A. Jones Construction Company*, 215 S. C. 135, 143, 54 S. E. (2d) 545, 549, wherein the South Carolina Supreme Court stated:

> "The liability imposed upon the principal contractor by the terms of Section 7035-22 (now Section 72-111) is secondary in nature." (Emphasis and parenthesis supplied.)

The Court below, in rejecting the reasoning of the *Ballard case*, relied upon *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825, the facts of which we submit are entirely distinguishable from, and not controlling upon, those in the instant case. In the *Marchbanks case*, the number of the employees working under the independent contractor was so small that he was not required to, nor did, carry compensation insurance, thus bringing the employer primarily liable under the Act, whereas in the instant case the independent contractor was financially responsible and carried compensation insurance, thus absolving the respondent from any liability for the payment of compensation benefits under the Act. On this point, the Court in the *Marchbanks case*, in discussing the reason for the enactment of the provision of the Act herein involved, stated at page 828 in the S. E. Reporter and at page 343 in the S. C. Reporter:

> "Doubtless in many instances such contractor would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such contractor would not be required under the Act to carry compensation insurance. It was therefore provided under the first paragraph that when such work in which the employee was engaged was part of

the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not."

"The General Assembly evidently did not wish to extend the above rule to a case where such work was not part of the trade or business of the owner. To illustrate, if a merchant wished to construct an apartment house, the General Assembly did not desire to hold him responsible in compensation for injuries to employees of the contractor to whom the contract had been awarded for the construction of the apartment house."

For the foregoing reasons, it is respectfully submitted that the dismissal of respondent's affirmative defense by the District Court was eminently correct, and the reversal by the Court below of the District Court's ruling was clearly erroneous.

II

Where evidence in support of an affirmative defense, although legally sufficient, is subject to conflicting inferences which may be drawn by reasonably minded men and is dependent upon witnesses whose credibility is in issue, it is beyond the power of a federal appellate court to direct entry of judgment in favor of a defendant on the issue of such defense.

The Court below, in reversing, undertook to direct entry of judgment for respondent under the assumption that (1) the testimony of respondent's manager, A. J. Hurt, that respondent built with its own facilities three of its substations was uncontradicted; (2) Hurt's testimony was credible and therefore conclusive; and (3) the only inference or conclusion deducible from such testimony was that respondent was engaged in the business of constructing substations.

Petitioner challenges both the power and assumption of the Court below. He submits that the witness Hurt changed.

corrected, retracted and recanted the testimony upon which the Court below relied. And even if the evidence may be construed to be legally sufficient, the witness Hurt's testimony, although not contradicted by adverse testimony, was self-contradictory. Petitioner also submits that by reason of such self-contradictions, evasiveness of the witness, his interest in the case and his manner of testifying, the credibility of this witness was clearly put in issue which is for a jury to determine. It is also submitted by petitioner that even if the credibility of the witness Hurt were not in issue, and even if the record can be viewed as if there were testimony in the case that respondent constructed three substations with its own facilities, the last of which was constructed three years before petitioner's injuries, despite the subsequent change of Hurt's testimony concerning these facts, the conclusion is clear that respondent had abandoned such work three years prior to petitioner's injuries and was not engaged in the business of constructing substations at the time of the injuries. At the least, these circumstances presented for the determination of a jury the factual question of whether respondent at the time of petitioner's injuries was engaged in the business of constructing substations, if indeed it ever was engaged in such business, so as to invoke the basic defense of the South Carolina Workmen's Compensation Act.

A. **The Court below was without power to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence.**

That it would be an undue invasion of the jury's historic function for an appellate court to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence is an established rule of judicial review.

Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620;
Tennant v. Peoria & Pekin Union R. Co., 321 U. U. 29.

It is also well settled that testimony of a witness, even if not contradicted by adverse testimony of other witnesses, raises an issue of credibility which is for a jury to determine where the witness has an interest in the outcome of the case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, his testimony is self-contradictory, evasive, equivocal, clouded with uncertainties and generalities, or his manner of testifying gives rise to doubts of his sincerity, *Quock Ting v. U. S.*, 140 U. S. 417, 20 Am. Jur., page 1030, Section 1180 *et seq.*

B. **The evidence of record pertaining to respondent's affirmative defense manifests that the action of the Court below in directing entry of judgment for respondent constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution and was in conflict with the decisions of this Court.**

The Court below, in directing entry of judgment for respondent, contrary to established principles of law and invading the province of the jury, judged the credibility of the material witness, A. J. Hurt, and viewed the case in the light most favorable to the respondent; it relied upon the testimony of Mr. Hurt that respondent used its own facilities and employees to construct three of its substations, despite his subsequent change of testimony, and his inconsistent statements given on deposition, as conclusive that the respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to petitioner's action herein.

Viewing the testimony of Mr. Hurt as a whole, as it must be viewed on appeal, and not out of context as viewed

by the Court below, it becomes clear that his credibility became an issue determinable by a jury; and, even assuming that after Mr. Hurt completed his cross examination there was evidence remaining in the record that respondent had used its own facilities to construct substations, it is clear from the record that respondent at the time of petitioner's injury had abandoned such work; or, at the least, that the evidence was subject to conflicting inferences and conclusions on the question of whether respondent was engaged in the business of constructing substations at the time of petitioner's injuries.

The evidence of record as heretofore pointed out shows (1) that respondent had six substations; (2) that on direct and cross examination respondent company's manager, A. J. Hurt, testified that three of the substations were constructed with respondent's own facilities and employees, the last of which he stated was constructed with its own employees at Liberty, South Carolina, three years prior to petitioner's injuries; (3) that on being recalled to the stand for further cross examination the following day, Mr. Hurt stated that respondent did not use its own facilities and employees to construct its substation built at Liberty, South Carolina, three years prior to petitioner's injuries, but that the work was done by an independent contracting construction firm engaged in the business of constructing substations; (4) that Mr. Hurt finally testified that respondent did not use its facilities or employees to build any of its six substations; (5) that Mr. Hurt's testimony was evasive and equivocal; (6) that he refused to answer a material question propounded by petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might subject the witness to contempt of court; and (7) that Mr. Hurt's testimony on depositions taken before trial was in direct conflict with the knowledge he professed to

have about material facts to which he testified at the trial. Under the foregoing evidence, even if it can be held that the action of the District Judge dismissing the affirmative defense was erroneous, the credibility of the witness Hurt, the weight of his testimony and the conflicting inferences and conclusions that may be drawn from the evidence, are all questions which should be determined by a jury.

Therefore, assuming that the evidence in support of respondent's affirmative defense may be legally sufficient, it is respectfully submitted that the Court below, by substituting its view of the case for that which should be determinable by a jury, invaded the province of the jury, contrary to the rights of petitioner under the 7th Amendment to the Constitution of the United States.

III

Where, because of the ruling of a district judge declared erroneous by a federal appellate court, a plaintiff does not have the occasion to dispute or controvert the material facts of a defendant on the issue of an affirmative defense, it is beyond the power of the federal appellate court to deprive plaintiff of the right to controvert such material facts and have a trial on the merits by directing judgment against the plaintiff on the issue of the affirmative defense.

It is settled by the decisions of this Court that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits by directing judgment against him when such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Judge declared erroneous by the federal appellate court.

Weade v. Dickmann, Wright & Pugh, 337 U. S. 801;

Fountain v. Wilson, 336 U. S. 681;
Kaku Nagano v. McGrath, 342 U. S. 916.

In each case the question before this Court was whether the appellate court could order judgment for a successful appellant on an issue as to which the opposite party had no occasion in the trial court to produce evidence or controvert the material facts of the successful appellant.

The rationale of the foregoing cases applies with equal force to the instant case which presents the same important question. Petitioner's motion to dismiss the affirmative defense before his case in reply was based upon the particular legal theory that the evidence of respondent in support of its affirmative defense was legally insufficient to support a verdict for respondent on this defense and consequently did not warrant the presentation of any reply testimony by petitioner on the issue of such defense. This motion was granted, and, therefore, not only was there a lack of occasion to controvert respondent's testimony on this issue, but any further testimony on this point would have been superfluous and would have transgressed the ruling of the District Judge. The action of the District Judge in disposing of this issue at the first opportunity which in his opinion was appropriate and in accord with the rights of the parties was in consonance with the spirit of our federal procedural law as expressed in Rule 1 of the Federal Rules of Civil Procedure that there shall be a "just, speedy and inexpensive determination of every action".

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of his opponent's case in the trial court. It would thus tend to discourage, contrary to the spirit of the Federal Rules of Civil Procedure, mid-trial attacks on the legal sufficiency of an opponent's case and consequently add to the time and ex-

pense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the Constitution which was not framed nor adopted to deprive a party of either the right to a jury trial or of the right to challenge the legal sufficiency of the opponent's case. "The Amendment is impartial in the guaranty of both" *Galloway v. U. S.*, 319 U. S. 372, 393.

Also, the decision of the Court below directing entry of judgment for defendant is not an "appropriate" judgment which was "just" under the circumstances, and therefore not authorized by 28 U. S. C. 2106. *Bryan v. U. S.*, 338 U. S. 552.

It is therefore respectfully submitted that, in view of the fact that the petitioner had no occasion to dispute the material facts of respondent on the issue of its affirmative defense, in accordance with the applicable decisions of this Court, it was beyond the legitimate function of the Court below to direct entry of judgment for respondent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgment for respondent should be reversed and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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POINT I

Contrary to Respondent's argument in its brief, the fact that an "owner" owes a duty of due care to persons and employees of independent contractors working in the vicinity of dangerous instrumentalities owned and controlled by the "owner", does not permit the "owner" to invoke the provisions of the Workmen's Compensation Act to absolve himself from his common-law liability for negligence.

Respondent, at page 20 of its brief, takes and relies strongly upon the position that "if petitioner established by his proof that his injury resulted from respondent's negligence in carrying on his construction, he necessarily established by such proof that his remedy was under the South Carolina Workmen's Compensation Law, not the common law."

This argument is clearly untenable because the petitioner's action herein for negligence was based upon respondent's duty to exercise due care in the operation and maintenance of its own power lines to prevent electricity from running into such lines at places where it is dangerous to escape, and not, as respondent states, for "respondent's negligence in carrying on his construction."

Petitioner's theory and proof of negligence was that respondent's employee knew or should have known that electricity which it caused and permitted to run through its own lines was escaping therefrom causing the current to run into a line leading into the substation where to the knowledge of respondent it was dangerous to have current, resulting in the loss of petitioner's forearms. This theory was in accord with the South Carolina law as well as the general law. *Hill v. Carolina Power & Light Co.*, 204 S. C. 83, 28 S. E. (2d) 545; *Weeks v. Carolina Power & Light Co.*, 156 S. C. 158, 153 S. E. 119; *Hayes v. Southern Power Co.*, 95 S. C. 230, 78 S. E. 956; *Mitchell v. Light & Power Co.*, 45 S. C. 146, 22 S. E. 767; *Smith v. Appalachian Electric Power Co.* (C. A. 4), 74 F. (2d) 647; *Conowingo Power Co. v. State of Maryland* (C. A. 4), 120 F. 870.

To follow repsondent's argument that merely because of its duty of exercising due care to those in the vicinity of its existing lines, the work of the independent contractor thus becomes part of respondent's business would establish a precedent relieving and absolving owners from liability for tort to employees of independent contractors under all

circumstances and would never permit a common-law recovery for negligence against such wrongdoers. Respondent's argument, if tenable, would extend the liability of owners under the pertinent provision of the Act far beyond the meaning of the plain wording of the statute. As expressed in *Sears, Roebuck v. Wallace* (C. A. 4), 172 F. (2d) 802, 810, but not applied by the Court below in the instant case, the "statute was not intended to relieve employers from liability for their own negligence which causes injury to the employees of independent contractors engaged in work outside the scope of the latter's occupation."

We therefore submit that respondent's argument on this point is wholly without merit.

POINT II

Contrary to the contention of Respondent under its newly advanced theory that the substation at the time of Petitioner's injuries was an integral part of the commercial function of Respondent's business, there is no evidence of record to support this theory.

Respondent contends, in its brief at pages 42-43, that "the facilities, when completed, became an essential and integral part of its operating system and that accordingly, when Petitioner sustained his injuries, he was engaged in work which was essential and entered directly into and became a part of the business of the person for whom the work was being done."

Petitioner submits that this contention is clearly untenable. It is undisputed that at the time of petitioner's injuries the substation was not completed as appears from respondent's statement at pages 42 and 43 of its brief that "the facilities, **when completed, became** an essential and integral part of its business." And it is also implicit from the foregoing statement that the substation, at the time

of petitioner's injuries, prior to completion, was not and could not have been an essential and integral part of its operating system.

And apart from the foregoing, it is submitted that there is no evidentiary support in the record for respondent's newly advanced contention.

Respondent produced no evidence by expert or lay witnesses, or otherwise, to show how or in what manner a substation, during its process of construction and prior to its completion and delivery over to respondent upon payment by it of the contract price, was or could have been an integral part of respondent's operating system. In fact, evidence was not even produced showing how or in what manner a completed substation functions as an integral part of respondent's operating system. The commercial function of respondent's business is the sale of electricity and nowhere in the record could any evidence be found that the work of constructing a substation "enters directly into the successful performance of the commercial function" of respondent in supplying and distributing electric power.

On this point the Court, in the leading case of *King v. Palmer*, 129 Conn. 636, 640, 641, 30 A. (2d) 549, 552, stated and illustrated the controlling principles as follows:

> "* * * We have regarded, however, the broad policy of the Workmen's Compensation Act: *Bellow v. Notkins*, 101 Conn. 34, 37, 124 A. 831; *Massolini v. Driscoll*, 114 Conn. 546, 553, 159 A. 480; and in effect have held that the words 'process in the trade or business' included all those operations which entered directly into the successful performance of the commercial function of the principal employer. In this class of cases fall the washing of the windows of a factory; *Fox v. Fafnir Bearing Company*, 107 Conn. 189, 193, 139 A. 778, 58 A. L. R. 861; the placing of the calks in the shoes of horses by a driver engaged in collecting ashes for a city which had contracted out the performance of that func-

tion; *Massolini v. Driscoll, supra;* and the removal of rubbish in connection with the operation of a store; *Hoard v. Sears, Roebuck & Company, Inc.*, 122 Conn. 185, 189, 188 A. 269. On the other hand, where the work in which the employees is engaged does not directly enter into the performance of the commercial function of the claimed principal employer **but only affords facilities for the conduct of his trade or business,** we have held that the work is not a 'process' in that trade or business. This is so as regards the construction of a factory building; *Bogoratt v. Pratt & Whitney Aircraft Co.*, 114 Conn. 126, 436, 157 A. 860; and the construction of a partition in a factory." * * * (Emphasis added.)

And in *Glidden Rural Electric Cooperative v. Iowa Employment Security Commission* (Iowa), 20 N. W. (2d) 435 where the same question was before the Iowa Court, in rejecting the contention that the work of constructing the cooperative's primary and secondary lines being performed by the independent contractor was part of the usual business of the electric cooperative, it was stated:

"To accept appellee's view of the matter, we would have to hold that the term 'usual' business of appellant meant all things done by appellee in the preparation for the distribution of its product, electricity."

Also applicable herein is *Horrell v. Gulf and Valley Oil Co., Inc.*, 15 La. App. 603, 131 So. 709, a case factually similar to the instant case, wherein death resulted to an employee of an independent contractor engaged to construct a furnace in defendant's oil refinery. In discussing the identical question presented herein, the Court stated:

"It is no part of the trade, business or occupation of the manufacturing concern to erect its factory buildings. **Its business is to operate it after its erection** * * * (Emphasis added.)

"If the principal may contract with the independent contractor for original construction (without lia-

bility to his employees under the statute), we see no reason why he may not contract for additional necessary construction or reconstruction.

"On the other hand, it is clear that, after the factory is completed and in operation, the principal may not employ an independent contractor to undertake any part of the business of operating the factory and thus escape liability in compensation to the employees actually engaged in carrying out the work undertaken by the independent contractor."

And in *Packett v. Moretown Creamery Company*, 91 Vt. 97, 99 A. 638, the Court, discussing the liability of a creamery under the Workmen's Compensation Act for the payment of compensation benefits to an employee of an independent contractor engaged to construct a building for the use of the creamery, stated in the following language:

"The true test is, did the work being done pertain to the business, trade or occupation of the creamery company, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the company from liability. The finding of the board is that the creamery company, at the time of the injury, was engaged in the creamery business. There is nothing to show that the company was engaged in the business of erecting buildings, unless such is the effect of the fact that Flynn was erecting for it a building under a contract which made him an independent contractor and not an employee. But such is not the reasonable interpretation of employment 'for the purpose of the employer's trade or business' and 'in a trade or occupation * * * for the sake of pecuniary gain.' It would be quite as reasonable to say that Flynn was engaged in the creamery business in contemplation of the act as that the creamery company was engaged in the business of erecting buildings. We might as well say that a farmer who lets a contract to build a barn or corncrib on his premises is engaged in the business of contractor and builder or that the business of the

contractor, while thus engaged, is that of farming. * * *."

In *Boseman v. Pacific Mills*, 193 S. C. 479, 8 S. E. (2d) 878, the Court held that the work of painting the inside of a mill's water tank being done by an independent contractor constituted an integral part of the mill's business of manufacturing cloth. Unlike the facts in the instant case, evidence was produced in support of the holding of the cited case that (1) the mill furnished the equipment, ladders, lumber and scaffolding necessary to do the work, and (2) that such work was essential and necessary for the fire protection and continuance of the mill's principal, usual and normal business of manufacturing cloth, without which work such operations could not, because of fire hazard, safely continue. In pointing out such requirements of proof which were absent in the present case, we quote:

> "The testimony was to the effect that the mill furnished all the paint, the ladders and any lumber or scaffolding necessary to do the work. As already seen, the contract itself contained a postscript that 'the above work is all subject to inspection and approval by representatives of Pacific Mills.' The tank was an integral part of the mill business. There was also testimony to the effect that the mill desired that the work on the inside of the tank be completed as soon as possible so that its everyday, ordinary service, that of fire protection, could be resumed, it being shown that the mill depended upon this tank for such protection. The very nature of the work done by the mill, that of the manufacture of cotton into cloth, especially required the best of protection against fire. Hence this tank was particularly necessary and essential in the operation and carrying on of the business of the mill. It, therefore, follows that the painting of the tank was such a part of the trade, business or occupation of the Pacific Mills as would constitute Martin a subcontractor, and thus render the mill liable to the beneficiary of Boseman for payment of compensation."

It should be noted that in the *Boseman case, supra*, the water tank, a completed facility in use,* was held to be an integral part of the mill's business because "it was shown that the mill depended upon" it for its operation, **and that this facility was owned and controlled by respondent and in use and operation at the time the maintenance work was performed therein,** a necessary requirement as pointed out by the South Carolina Supreme Court in *Miles v. W. Va. Pulp and Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26. And in contrast to the facts therein, here the substation, at the time of petitioner's injuries, was not an integral part of respondent's business because it was neither owned, possessed, controlled nor used by the respondent. There was no evidence of record by either lay or expert testimony, or otherwise, to show how or in what manner a substation prior to and during the process of its construction and erection was or could have been an integral part of respondent's operating system.

To reach the conclusion that work constitutes an integral part of one's business, where such work is not ordinarily and appropriately performed by his direct employees, evidence is required, that such work is performed with some degree of constancy, frequency or regularity in the "owner's" business in accordance with the requirement that the words, to wit, trade, business and occupation, "non-tech-

* In *Boseman v. Pacific Mills, supra*, in the brief of appellees (claimants) filed in the South Carolina Supreme Court, the importance and necessity of evidence of completion and use by the owner of the facility to constitute it an integral part of the owner's business was successfully stressed and pointed out. Thus, in their contention, for the application of the Act, which was upheld by the Supreme Court, claimants stated in their brief, from pages 2, 4 and 5 of which we quote, as follows: "*The tank was not in the process of being built. It was already up and an integral part of the mill.* * * *" The appellant has cited a few cases to support his contention, all of which we feel have some distinguishing features different from the case in hand. It is worthy of note that in the cases of * * * *Packett v. Moretown Creamery Co.*, * * *; all of which appellant cites at the respective pages noted in his brief, the workman was injured while working on some part of a plant or factory that had not yet been built and become an integral part of the business of the original contractor."

nical words used in the statutes are taken to have been used in their ordinary sense and acceptation", *Benbow v. Edmunds High School*, 220 S. C. 363, 371, 372, 67 S. E. (2d) 680, 683, 684, and without which work the continued operation of the owner's principal, usual and normal business would be jeopardized or cease to function. *Boseman v. Pacific Mills, supra.*

Not only is there an absence of the required evidence, but on the contrary, the opposite appears in the record. Mr. Hurt testified that the business involved herein was operated by the State of South Carolina Authority without even a single substation prior to its acquisition by respondent (R. 42) thus indicating that such business could function without the necessity of a substation. He also testified that prior to the construction of the two substations built at Walhalla and Pickens under its contract with Bouligny, the respondent had, other than the station acquired by it from the State of South Carolina Authority and which was not considered as a substation but simply as a transformer (R. 42), three other substations, to wit, the Liberty substation which was built by Sumter Builders, and the Seneca and Oakway substations (R. 40). The record does not show whether the latter two substations were acquired from the State Authority or built by independent contractors subsequent to respondent's acquisition of the business. But viewing the evidence in the light most favorable to respondent, assuming that the latter two substations had been built subsequent to acquisition by respondent of its business, it is thus apparent that, at the most, only three substations were built for respondent during its fourteen-year period of operating the business from 1939 (R. 29) to 1953 when the substations at Walhalla and Pickens were constructed by Bouligny (R. 35). And the record also fails to show whether they were built at the same time or at

occasional intervals. Such evidence, we submit, is not only totally lacking in the proof required to establish that the work of constructing substations constitutes an integral part of respondent's business, but is clearly indicative of the contrary.

Although the Court below in its prior case of *Sears, Roebuck & Company, Inc. v. Wallace*, 172 F. (2d) 802, 810, clearly expressed the controlling principles which carry out the purpose of the provision of the Act herein involved, it failed to apply these principles to the facts in this case, contrary to the applicable standard of this Court in testing the legal sufficiency of evidence. In expressing such controlling principles, the Court in the *Sears case* quoted with approval the following:

> "If the work is of such a character that it ordinarily or appropriately would be performed by the principal employer's own employees in the prosecution of its business, or as an essential part in the maintenance thereof, it is a part or process of his work.
>
> "This test carries out the chief purpose of enactments like the Virginia statute which is to 'protect the employees of subcontractors who are not financially responsible and to prevent employers from relieving themselves of liability (for compensation) by doing through independent contractors what they would otherwise do through direct employees.' See Notes 58 A. L. R. 872, 105 A. L. R. 580. **The statute was not intended to relieve employers from liability for their own negligence which causes injury to the employees of independent contractors engaged in the performance of work for employers outside the scope of the latter's occupation.**" (Emphasis added.)

The South Carolina statute involved herein was enacted for the same purpose, that is, as expressed by the South Carolina Supreme Court in *Marchbanks v. Duke Power Company*, 190 S. C. 336, 342, 2 S. E. (2d) 825, 827:

"* * * to protect the employees of subcontractors who are not financially responsible and to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do **through direct employees.**" (Emphasis added.)

Contrary to respondent's contention at page 14 in its brief, its purpose was not to provide the employee "double protection"; its purpose was simply to provide the employee protection under circumstances where the direct employer is not obligated by law to provide Workmen's Compensation coverage for the employee.

In the case *sub judice*, however, it is clear from the record that petitioner's employer, Bouligny Construction Co., was financially responsible, having qualified under the Act, and that respondent did not engage Bouligny Construction Co. to do work which respondent otherwise does through its direct employees for the purpose of relieving itself from liability for payment of compensation benefits.

It is therefore submitted that, in the absence of the reason for the passage and application of the pertinent provision of the Act involved here, good logic and sound reasoning dictate that such provision of the Act is neither applicable, nor should be applicable, to the facts in the instant case.

The reason for the enactment of the pertinent provision of the Act also furnishes additional support for the decision of the Court in *Ballard v. Southern Cotton Oil Co.*, 145 F. Supp. 882, wherein it was held that if a person referred to as an "owner" secondarily liable under the Act does not come within it to bear its liability, he cannot be accorded its immunities even though the work performed by the independent contractor may be deemed part of the owner's business. In distinguishing the *Marchbanks case*, the District Judge pointed out that the Act was applicable only in

those cases where there was evidence that the independent contractor was financially irresponsible because he did not come under the Act compulsorily. In other words, it was not intended that the Act apply unless the employee's protection otherwise depended upon the mere whim of the contractor whether he would operate under the Act rather than his compulsory inclusion within the Act. This reasoning finds fortification in the recent South Carolina case of *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566, wherein the Court, in discussing the reason for the passage of the Act, indicated that it is intended to apply only to cases where "subcontractors" are not required by law to operate within the coverage of the Act, as follows:

> "It was pointed out that the purpose of the statute is to extend the benefits of workmen's compensation to workmen who otherwise would not be entitled to them. It is a protection of the employees of irresponsible contractors who do not provide workmen's compensation coverage for their employees, and prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees."
>
> "In the case in hand it appears that appellant and Emporium operated within the coverage of the compensation law; **but that of Emporium must have been voluntary because they had only three employees in appellant's store.** Sees 72-107 (2) and 72-109. Except for this voluntary assumption by Emporium of liability under the Act and except for the effect of Sec. 72-111, plaintiff would be without the protection of workmen's compensation." (Emphasis added.)

Thus, even assuming that work may be part of an "owners" business, to permit him to invoke the Workmen's Compensation Act to avoid his common law liability for tort to a person whose immediate employer, the independent contractor, comes within the mandatory provisions of the Act, would extend its application beyond the manifest and

expressed purpose of the Act. It would serve to protect not the employee but the "owner" to the detriment of the employee.

In the instant case, the record fails to show that the independent contractor's operation under the Act depended upon its voluntary, rather than compulsory, operation thereunder. Therefore, it is submitted that in accordance with the resuming of both the *Ballard* and *Adams cases*, the Act is not applicable to the facts herein. And in this connection, it should be noted that in all of the South Carolina cases in which the pertinent provision of the Act involved herein was held applicable the person referred to as a "subcontractor" under the Act did not come within the Act, or, if he did, his operation thereunder was voluntary rather than compulsory. Thus, in *Marchbanks v. Duke Power Company*, *supra*, the "subcontractor" had less than the number of employees he was required to have in order to compulsorily come within the Act; in *Adams v. Davison-Paxon Company*, *supra*, the "subcontractor" likewise did not employ the required number of employees to compulsorily come within the Act, although it did operate voluntarily under the Act; in *Kennerly v. Ocmulgee Lumber Company*, 206 S. C. 481, 34 S. E. (2d) 792, the "subcontractor" was engaged in logging operations which are excluded from compulsory operation under the Act; in *Hopkins v. Darlington Veneer Company*, 208 S. C. 307, 38 S. E. (2d) 4, the "subcontractor" was likewise engaged in logging operations excluded from the compulsory operation under the Act; and in *Smith v. Fulmer*, 198 S. C. 91, 15 S. E. (2d) 681, the number of employees of the "subcontractor" did not require compulsory compliance with the Act.

In connection with the foregoing cases cited by respondent in support of its position—cases in which the pertinent provision of the Act was held applicable—it should be

noted, as stated by the South Carolina Supreme Court in *Smith v. Fulmer, supra, that* "* * * there are so many different factual situations which may arise that no easily applied formula can be laid down for the determination of all cases. In other words, 'it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the statute. It is in each case largely a question of degree and of fact.'" And bearing this in mind, it is significant that in each of the foregoing cases there was "ownership" by the employer of the subject matter of the work which, as was so aptly expressed in *Miles v. W. Va. Pulp & Paper Company, supra,* "is in significant contrast to the facts in this case. Here there was no ownership by defendant" (respondent) of the substation prior to completion and delivery to respondent upon payment by it of the contract price. It is also interesting to note that in the South Carolina cases of *Marchbanks v. Duke Power Co., supra; Kennerly v. Ocmulgee Lumber Co., supra,* and *Hopkins v. Darlington Veneer Co., supra,* it was admitted by the pleadings and contentions of the respective parties in each of the cases that the work being performed by the contractor was part of the principal employer's business, but such cases were contested on other grounds, which likewise is in "significant contrast to the facts in this case."

Although respondent cites the recent unreported case of *Hudson v. Horry Electric Cooperative, Inc.*, we submit that instead of supporting respondent's position, it tends to support the contrary. It clearly appears from the language of that case that its defense was tried on the same theory by same counsel representing respondent that the instant case was tried in the District Court. However, as distinguished from the instant case the work involved in the cited case was the "construction of an electric power

line" and not the steel construction work of erecting a structural steel substation. And it is particularly significant that the holding in the cited case indicates that there was ample evidentiary support for the theory pursued by the defendant that its direct employees ordinarily and appropriately perform the work of constructing lines with its own facilities, and we quote therefrom as follows: *

> "The record clearly indicates that the construction of new lines * * * has been done by the Cooperative's own employees. * * * It is apparent from the record that the Cooperative owns and maintains equipment used in the construction of lines * * * and that it keeps in its workhouse materials and supplies required in the construction of new lines * * *."
>
> "According to the record, the Cooperative and its employees were then doing the same type and character of construction * * * as the work being done by Little Electric Company and its employees under the contract above referred to. According to the record, the Cooperative and its employees have constructed approximately fifty per cent of the lines * * *. Under the Little Contract, approximately 130 to 140 transformers were to be installed, whereas, the Cooperative installed with its own employees during the year 1949, approximately 600 transformers."

And as distinguished from the apparent abundance of facts adduced in the cited case to support the defendant's theory, as heretofore pointed out, in the instant case the record is barren of evidence of such facts.

It is apparent that respondent, now recognizing the lack of evidentiary support for its theory of defense adopted in the trial court, seeks to pursue in its brief a new and different theory in support of its affirmative defense. That respondent's present theory is a newly advanced one is manifest from an examination of the record.

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* Appendix to Respondent's Brief, p. 53 at pp. 55, 56.

The record shows that respondent pleaded and tried its affirmative defense in the trial court on the theory that it was in the business of supplying electricity to consumers and the work of constructing substations was part of its business because its direct employees could and do perform all the types and classes of work that was being done by the independent contractor, including the construction of substations. (Amended answer: R. a; R. 31, 33.)

And in the trial of the case in the District Court, respondent proceeded upon the theory that such defense could be established by evidence that its direct employees are qualified to and do perform all the types and classes of work that was being done by the independent contractor under its contract with respondent, including the construction of the substations involved herein. Such evidence, if established, would have been legally sufficient to create a factual issue pertaining to one of respondent's requirements of proof, in accordance with the decisions which seek to carry out the purpose for the passage of the pertinent provision of the Act involved herein. And as enunciated in *Shafer v. Southwestern Bell Tel. Co.* (Mo.), 295 S. W. (2d) 109, this theory depends upon proof that the **whole** of the work being performed by the independent contractor under its contract with the owner is work that is ordinarily and appropriately done by the direct employees of the "owner"; it is not sufficient that only part of such work is ordinarily and appropriately performed by the "owner's" direct employees.

Thus, proceeding upon this theory in the trial court, testimony was adduced from respondent's manager, A. J. Hurt, that respondent's direct employees "do all of the types and classes of work that was being done under this Bouligny contract", and that although the employees of respondent "could and did do all types of work called for

in that contract", the independent contractor Bouligny was awarded this contract "to expedite matters". (R. 33.) It was also adduced from the witness that the work performed by the direct employees of respondent included the work of constructing three substations. (R. 31.)

This was the evidence upon which respondent sought to establish its affirmative defense, but as pointed out in petitioner's original brief, the witness Hurt changed, corrected, recanted and repudiated this testimony by stating that respondent's direct employees did not construct any of its substations (R. 41, 42, 76, 77) and by making the following admission—that he was "in error in your testimony on direct examination when you said that the regular employees of the Blue Ridge REA are qualified to do all types and classes of work that Bouligny Construction Co. does"; thus destroying all of its probative value in accordance with the standard applied by this Court in testing the legal sufficiency of evidence, and consequently leaving the record with no evidence to support respondent's theory of defense pursued in the trial court.

Respondent now seeks to evade the impact of Hurt's changed testimony given on cross examination, by its contention that respondent had nine substations in all and thus the six substations which Hurt stated on cross examination were not built by respondent's direct employees did not include the three substations referred to by Hurt on his prior examination as being built by the direct employees of respondent because, as respondent states at page 29 of its brief, all three of the latter substations "had either been rebuilt or had been abandoned at the time of the trial". It is submitted that this contention cannot be justified under any view of the evidence. It not only lacks evidentiary support, but the record shows conclusively to the contrary.

The record shows that on cross examination, Hurt was given the opportunity to expressly state that respondent had nine substations in all, if such was the fact, but instead of so stating, Hurt, when questioned about this, stated to counsel for petitioner that he, petitioner's counsel, was mistaken in his apparent assumption that respondent had nine substations because, as Hurt explained, some but not all of the six substations in operation had been built by independent contractors under contracts let out by respondent (R. 39), thus at that time still adhering to his testimony that three of the six substations had been built by respondent's direct employees. It should be noted that the foregoing testimony was given by Hurt prior to his cross examination when, confronted with undisputed evidence to contradict this testimony, he finally admitted that none of its six substations had been built by respondent's direct employees. Respondent's contention is further repudiated by examination of the colloquy between the District Judge and counsel for respondent as appears from the record wherein, when the District Judge stated to counsel for respondent that "according to your own testimony, you say they only built three and that is half of them", counsel for respondent took no exception to this remark and observation of the Court, but admitted that respondent had six substations, with the only qualifying remark that "one of those three has been subsequently replaced." (R. 51.)

Thus it is apparent that there is no substantial evidence of record to support respondent's affirmative defense under its theory advanced in the trial court; and in view of the facts herein and in accordance with the pertinent provision of the Act involved, the purpose for which it was enacted, and both the federal and state law applicable, it is respectfully submitted that the present theory advanced by respondent is clearly untenable.

POINT III

Contrary to the contention of Respondent, assuming that the evidence presented by Respondent in support of its affirmative defense was legally sufficient, the factual issue of the weight of the evidence and the credibility of witnesses, although not the subject of jury trial in cases before the State Industrial Commission, nevertheless requires a jury determination when brought and tried in the Federal Court.

The position of petitioner herein is that the evidence was legally insufficient to support respondent's affirmative defense and thus as a matter of law the trial judge was under a duty to dismiss the affirmative defense. However, even assuming that the evidence adduced from respondent's witnesses was legally sufficient, it is clear that under the decisions of this Court, *Quock Ting v. U. S.*, 140 U. S. 417; *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, a factual question was presented notwithstanding the absence of controverting evidence by other witnesses.

Respondent contends, at page 41 of its brief, that notwithstanding petitioner's position that a factual question was created, it is for the Court and not the jury to "resolve the conflicts in the evidence" and determine the facts, and cities in support of this contention the South Carolina case of *Adams v. Darison-Paron Co.*, 230 S. C. 532, 96 S. E. (2d) 566.

In this connection, it may be noted that according to the State practice governing cases brought before the State Industrial Commission, the South Carolina Supreme Court is not bound by the findings of fact of either the trial tribunal or the lower reviewing Court, even though such findings have evidentiary support. *Miles v. W. Va. Pulp & Paper Co.*, 242 S. C. 424, 426, 427, 48 S. E. (2d) 26, 27. Therefore, of course if the state procedural law governing

cases brought before the Industrial Commission be applicable herein, this Court, likewise, would not be bound by the factual findings of the Court below and be free to, and should, reach an opposite factual finding than found by the Court below.

However, since this action was brought in the federal court and sounds in tort at common law the procedural question of whether factual issues are triable by jury is controlled, not by the state practice, but by the practice in the federal courts which in the interest of the orderly and uniform administration of justice is governed by the Federal Rules of Civil Procedure and the Seventh Amendment to the United States Constitution. *Herron v. Southern Pacific Co.*, 283 U. S. 91; *Ettelson v. Metropolitan Life Ins. Co.* (C. A. 3), 137 F. (2d) 62; 5 Moore's Federal Practice, Section 38.08 (6).

It is therefore submitted that, assuming *arguendo*, the evidence produced by respondent was legally sufficient to support its defense, in accordance with the applicable decisions, there was created a factual issue determinable by a jury; and, in any event, whether such issue be determinable by the court or jury, it could not be resolved against petitioner under the circumstances of this case without violating his right to be heard under the "due process" clause of the United States Constitution.

POINT IV

Contrary to the contention of Respondent, even assuming, arguendo, that Respondent's evidence was legally sufficient, regardless of whether it created a factual issue determinable either by a court or jury, it is clear that the action of the court below in directing entry of judgment for respondent deprived Petitioner of his day in court and right to be heard, in violation of the "due process" clause of the

Fifth Amendment to the United States Constitution and was contrary to the applicable decisions of this court.

Respondent, at page 49 of its brief, contends, "There is no question that petitioner had full opportunity and occasion in the District Court to offer reply testimony to the respondent's case on this or any other issue", and relies for its contention upon the statement of petitioner's counsel to the Court "that he did not know of any reply that was necessary when directly asked by the Court if he would offer any testimony". The short answer to this contention is that the District Court agreed with the statement of petitioner's counsel as is manifest from the District Court's action in dismissing the affirmative defense. It is thus obvious that there was no occasion nor necessity at the trial of the case to present evidence on an issue which had been withdrawn by the Court from the case.

Respondent also relies for its contention upon the fact that petitioner "remained silent when the Court expressly allowed respondent to reserve its rights and to include this same defense in its grounds for a directed verdict." It is clear, however, that this express allowance by the District Court was made after the issue of the affirmative defense had been withdrawn from the case and during respondent's argument on its motion for a directed verdict. The record also shows that upon completion of respondent's argument the motion was promptly denied by the Court. Under such circumstances, it is clear that petitioner acted with propriety in accordance with orderly trial procedure in not interrupting respondent's argument on its motion; and in view of the Court's prompt denial of such motion, we submit it is also obvious that any objection by petitioner to a ruling in his favor would have been entirely out of order.

Respondent, at page 50 of its brief, also contends that petitioner's position in moving for a dismissal of the affir-

mative defense in the trial court is inconsistent with his present position that he is entitled to a jury trial.

When we consider that both the motion of petitioner for an involuntary dismissal of respondent's affirmative defense made at the close of respondent's evidence but prior to petitioner's case in reply and the motion of respondent for an involuntary dismissal of petitioner's case made at the close of petitioner's case but prior to respondent's case in defense did not contemplate a waiver by either party to present controverting testimony and have a jury trial in the event of denial of such motions, it becomes manifest that there is no inconsistency between petitioner's present position and that asserted by him at the trial.

It is thus clear that even assuming, *arguendo*, that respondent's evidence was legally sufficient, regardless of whether the only conclusion that could be drawn therefrom was in favor of respondent's affirmative defense, or, on the other hand, it created a factual issue determinable either by a court or jury, the action of the Court below violated petitioner's rights under the "due process" clause of the Fifth Amendment to have his day in court and be heard, and was contrary to the applicable decisions of this Court. *Weade v. Dickman, Wright & Pugh*, 337 U. S. 801; *Fountain v. Wilson*, 336 U. S. 681; *Kaku Nagano v. McGrath*, 342 U. S. 916.

Petitioner submits, however, that the constitutional issues of petitioner's right under the "due process" clause and his right to a jury trial under the Seventh Amendment need not be reached by this Court if it holds that, as petitioner contends, there is want of substantial evidence of record to support respondent's affirmative defense. And even if this Court should hold that respondent's evidence is legally sufficient to create a factual issue, the foregoing constitutional questions would likewise be rendered academic if in so holding this Court also holds that the pro-

cedural state law governing cases brought before the Industrial Commission is applicable and in applying same resolves the factual issue contrary to the findings of the Court below.

Succinctly stated, in accordance with applicable principles of law, the judgment of the District Court should be affirmed and reinstated in the event this Court (1) should conclude that respondent's evidence was legally insufficient or (2) should hold that a factual issue was created by respondent's evidence, but in so holding applies the state practice which respondent contends is applicable and reaches a finding of fact contrary to that of the Court below. In the event, however, that this Court should reach the constitutional issues presented herein, the case should be remanded for a new trial as otherwise petitioner's right to be heard under the "due process" clause of the Fifth Amendment and his right to a jury trial under the Seventh Amendment would be clearly violated.

CONCLUSION

For the foregoing reasons and for the reasons stated in petitioner's brief, it is respectfully submitted that the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgment for respondent be reversed and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

Subsequent to the oral argument of this case on January 28, 1958, this Court on March 3, 1958, issued an order restoring the case to the calendar for reargument and asked counsel "to brief and argue the application of *Erie R. Co. v. Tompkins*, 304 U. S. 64, in connection with Question II of the Questions Presented in Respondent's Brief, and Point III of the Points in Petitioner's Reply Brief", pursuant to which this Supplemental Brief is herewith submitted.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III—United States Constitution

"Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *"

28 U. S. C. 2072. Rules of civil procedure for district courts

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

ARGUMENT

Contrary to the contention of Respondent, the mode or manner of determining the rights and duties of litigants in suits brought in the Federal courts is governed by the Federal law under the doctrine of Erie R. Co. v. Tompkins, 304 U. S. 64.

Under its discussion of Question II contained at pages 46 and 47 of Respondent's Brief on Merits, respondent states: "While the Seventh Amendment preserves the right to jury trial according to the rules of the common law, it is well established and fundamental that, although questions of fact must be decided by the jury and may not be re-examined by the Court, the question whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the Court."

Petitioner has no quarrel with the foregoing statement and in fact agrees with it for the reason that whether or not the doctrine of *Erie* applies, this rule is the same in the State courts of South Carolina as it is in the Federal courts; in each jurisdiction the trial judge has the right to determine the sufficiency of the evidence of the party having the burden of proof. *Galloway v. U. S.*, 319 U. S. 372, 389; *Adams v. Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. (2d) 566.

Also, whether or not the burden of proving the affirmative defense of the application of the South Carolina Workmen's Compensation Act as the exclusive remedy is a matter governed by the State law or the Federal law makes no difference, for the rule in both jurisdictions is the same. However, it may be noted that according to the decision of this Court in *Palmer v. Hoffman*, 318 U. S. 109, the question of which party has the burden of proof is a substantial right which may materially affect the outcome of the litigation. Thus, in accordance with the *Erie* doctrine the State law governs this question. In South Carolina it is firmly established that "when one pleads an affirmative defense, the burden is on him to prove it." *McCabe v. Sloan*, 184 S. C. 158, 191 S. E. 905. And in *Googe v. Speaks*, 194 S. C. 206, 9 S. E. (2d) 439, the South Carolina Supreme Court held that the defense of the application of the Workmen's Compensation Act to a common law action for tort is required to be affirmatively plead. Such defense, just as the affirmative defense of contributory negligence, if proved by the preponderance of the evidence, establishes a want of a cause of action in the plaintiff.

And regardless of the application of the doctrine of *Erie R. Co. v. Tompkins* to the question of what standard should be applied by the trial judge in testing the legal sufficiency of the evidence of the party having the burden

of proof, the rule is the same in the State and Federal Courts. As pointed out in petitioner's original brief at page 19, both this Court, *Galloway v. U. S.*, 319 U. S. 372, 379, 380 and the South Carolina Supreme Court, *McDowell v. Stilley Plywood Co.*, 210 S. C. 173, 41 S. E. (2d) 872, 874, 875, in testing the legal sufficiency of the evidence of a party having the burden of proof, apply the standard of viewing the testimony of a witness as a whole and when so viewed refuse to give probative value to the testimony produced by a litigant in support of his burden where such testimony is subsequently changed, corrected or repudiated by the witness on the stand prior to the completion of his examination—a standard which has for its basis the promotion of the orderly administration of justice to discourage the giving of false testimony.

Applying the foregoing rules and standard to the facts in this case, and the principle flowing from the application of this standard that "mere speculation may not be allowed to do duty for probative facts", it is clear that respondent's evidence created no factual issue upon which a finding could properly have been made in favor of the affirmative defense. Petitioner therefore submits that following the traditional practice of refusing to decide constitutional questions when the record discloses other grounds of decision, *Peters v. Hobby*, 349 U. S. 331, 338, this Court could, and should, reverse the Court below and reinstate the judgment of the District Court on the ground that the District Court properly dismissed respondent's affirmative defense.

Assuming, *arguendo*, that the evidence presented by respondent created a factual issue, petitioner submits that the question of whether the Court or the jury shall be the arbiter of the facts is governed not by the State procedure and practice but by the Federal law under the decision of *Erie R. Co. v. Tompkins*, for two reasons, as follows:

1. Because the question of who shall be the arbiter of the facts involves, not a substantive, but a procedural matter which under our system of Federal jurisprudence does not, and should not, substantially change or affect the outcome of the litigation either for or against any of the parties.

2. Because Article III of the United States Constitution vests in Congress the sole power of determining the practice and procedure in the Federal courts and also because of the constitutional limitation of the Seventh Amendment.

We shall treat each of the reasons separately below.

1. The question of who shall be arbiter of the facts involves, not a substantive, but a procedural matter which under our system of Federal jurisprudence does not, and should not, substantially change or affect the outcome of the litigation either for or against any of the parties.

Admittedly, if the issue of whether respondent was in the business of constructing substations were litigated in a workman's compensation proceeding in South Carolina, under the controlling State practice and procedure, it would have been the province of the State Industrial Commission to resolve the conflicts in the evidence and to determine the fact of whether the work of the independent contractor, Bouligny Construction Company, in erecting substations to be delivered to respondent upon completion was respondent's business. The finding of the Industrial Commission would be reviewable, however, by two appellate tribunals, to-wit, first, the Circuit Judge sitting as an appellate court and second, the South Carolina Supreme Court, to determine whether such finding is "in accord with the preponderance of the evidence", *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 27; whereas, if this issue were litigated in a common law action for tort in a State court of South Carolina, it would have been the pro-

vince of the trial judge, rather than the jury, to resolve the conflicts in the evidence and to determine the fact of whether the work of Bouligny in constructing substations to be delivered to respondent upon completion was respondent's business, reviewable, however, only by the South Carolina Supreme Court to determine whether the finding of the trial judge is "in accord with the preponderance of the evidence", *Adams v. Davison-Paxon Co.*, 230 S. C. 532, 96 S. E. (2d) 566, 571.

Respondent, in its brief, contends that the State practice governs in determining the mode or manner in which the issue involved herein should be tried and reviewed. And, in the case *sub judice*, if this contention is followed to its logical conclusion, both the Court of Appeals and this Court would not be confined to an examination of the record merely to determine whether there was sufficient evidence to create a factual issue but would be empowerd also to examine the evidence to determine whether the finding of the trier of facts, based upon the credibility of the witnesses and the weight of the testimony offered by the party having the burden of proof, is "in accord with the preponderance of evidence". And under its contention respondent would be required to demonstrate not only that its evidence was legally sufficient but also that it sustained respondent's burden of proof of the affirmative defense by the "preponderance of the evidence."

Although it is respectfully submitted that the dismissal of the affirmative defense by the trial judge should be sustained either under the limited scope of appellate review for the reason that the evidence presented in support of the affirmative defense was legally insufficient, or under the unlimited scope of review for the reason that the respondent's evidence did not preponderate in favor of its affirmative defense, petitioner, however, must disagree with respond-

ent's basic contention that the mode of trial and scope of appellate review in the State courts govern in this case. Such contention is contrary to *Erie R. Co. v. Tompkins*, 304 U. S. 64, because the mode of trial and the scope of appellate review are clearly procedural matters which under the *Erie* doctrine must be governed by the Federal practice and procedure. Of course, the principles, tests and reasoning of the South Carolina decisions applicable in determining whether one is engaged in a particular business or whether Section 72-111 of the Act was intended to apply to particular circumstances are substantive matters which, under the *Erie* doctrine, govern and should be applied to the facts in this case in determining the issues of (1) whether Section 72-111 was intended to apply to circumstances wherein the injured workman's immediate employer is required by law, as distinguished from a voluntary election on his part, to provide workmen's compensation coverage for his employees and (2) whether the work of Bouligny Construction Company in constructing the substations to be turned over to respondent upon completion was respondent's business.

In passing, it should be noted that prior to the commencement of trial it was petitioner's position, first, that the affirmative defense should be dismissed on purely legal grounds (R. 2, page 7, Respondent's Brief), which presented a question of law as to whether Section 72-111 was intended to apply; and second, that if it was intended to apply the only issue of fact for a jury to determine would be whether the work of Bouligny in constructing substations to be delivered to and used by the respondent upon completion, was respondent's business.

And it is also worthy of note that at the trial the only questions of law submitted by the parties to the trial judge were: (1) upon petitioner's motion prior to his case in re-

ply, whether the evidence presented by respondent had probative value to create a factual issue upon which reasonably minded men could base a finding in favor of respondent's affirmative defense, and (2) upon respondent's motion made after the affirmative defense had been stricken, whether the only reasonable conclusion deducible from the evidence was that the work of Bouligny Construction Company in constructing substations to be turned over to and used by respondent upon completion, was respondent Blue Ridge's business (R. 52, 54). In sustaining petitioner's motion for a dismissal of the affirmative defense made after respondent's case and before petitioner's case in reply, the District Judge did not weigh the evidence, but merely confined himself to a consideration of the legal sufficiency of the evidence and very properly stated, "I don't know of any issues of fact to submit to the jury" (R. 49, 51). And in view of this ruling, the District Judge, of course, had no alternative but to deny respondent's motion for a directed verdict. As a matter of fact, in both the District Court and the Court of Appeals, neither party contended that the issue of fact, to wit, whether the work of Bouligny in constructing substations to be delivered to respondent upon completion was respondent's business, should be submitted as a matter of law to the District Judge as the trier of the facts; and, in dismissing the affirmative defense, the District Judge did not serve as the trier of facts. On the contrary, both litigants contended that no issue of fact was presented, but each for a different reason as pointed out above.

It is petitioner's position, as demonstrated in his original brief, that the respondent's evidence was insufficient to present an issue of fact which could reasonably be resolved in favor of respondent's affirmative defense; but if respondent's evidence could be judged legally sufficient to create a factual issue, petitioner submits (1) that reasonably minded

men may draw different conclusions therefrom, (2) that whether the evidence was subject to conflicting conclusions or to but a single conclusion in favor of respondent, the petitioner is entitled under the "due process" clause of the Fifth Amendment to have his day in court to present controverting evidence, *Saunders v. Shaw*, 244 U. S. 317, and (3) that the conflicts in the evidence and the conclusions therefrom should be ultimately determined by a jury in accordance with the Federal practice and procedure.

And apart from the foregoing, petitioner also takes the position that the affirmative defense as alleged in the answer did not constitute a legal defense to petitioner's cause of action. In its answer, respondent alleged that the petitioner's employer, Bouligny, was required to and did provide coverage for its employees, including petitioner, as distinguished from a voluntary election on the part of Bouligny to operate under the Act. Under such circumstances, in accordance with the decision of *Ballard v. Southern Cotton Oil Co.* (E. D., S. C.), 145 F. Supp. 882, and the reasoning of the South Carolina Supreme Court in *Adams v. Davison-Paxon Co., supra*, that Section 72-111 was intended not for the protection of employees under such circumstances but for the protection of employees not otherwise protected by law, it is clear that this section never became operative in the instant case, and respondent, therefore, should not now be permitted to claim the immunities thereof to relieve itself of its common law liability for negligence.

Adverting now to petitioner's first reason in support of his contention that the State law cannot govern the mode or manner of trial in the case at bar, he submits that the question of whether the court or jury shall be the trier of facts relates to a procedural matter, the determination of which is not controlled by the doctrine of the *Erie case* that

the Federal courts are bound to follow the substantive law of the State in which it sits.

In overruling *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865, this Court in *Erie R. Co. v. Tompkins* abridged the freedom of the Federal courts to exercise independent judgment in matters of general jurisprudence. It ruled that Federal courts, in diversity cases, must look to State law to determine the substantive rights of the litigants. In the same year the Federal Rules of Civil Procedure authorized by the Enabling Act of 1934, 28 U. S. C. (1940 Ed.), 723 b, made it clear that the Federal courts are not bound by State practice and procedure. However, both the Federal Rules and the *Erie case* excepted from Federal power matters dealing with "substantive" rights.

Although both the Federal Rules and the *Erie case* made it clear that matters relating to procedure shall be governed by Federal law, the determination of the difference between "procedural" and "substantive" law presented some difficulty. As stated by Mr. Justice Reed in the concurring opinion of the *Erie case* at page 92, "the line between procedural and substantive law is hazy but no one doubts federal power over procedure."

The problem presented here by the conflicting contentions of the parties is whether the question of determining between trial by jury or trial by court involves a procedural matter governed by the Federal practice and procedure or a substantive right governed by the rules and decisions of the State court.

The mode of approaching the problem is clearly pointed out by Mr. Justice Douglas in *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 199. The decisions of this Court teach that the crucial question in arriving at what is "substantive" and what is "procedural" is whether the application of the State rule in the Federal court would

substantially change the outcome of the case, and if it would then the matter is one of "substantive" right, otherwise it is a matter of "procedure". This approach to the problem has been applied by this Court in matters relating to equitable rights, *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202; to arbitration provisions in a contract, *Bernhardt v. Polygraphic Co.*, 350 U. S. 199; to right of a physical and mental examination of parties under Rule 35 of the Federal rules, *Sibbach v. Wilson & Co.*, 312 U. S. 1; to burden of proof, *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208; to conflicts of law rules, *Palmer v. Hoffman*, 318 U. S. 109; and to limitation of actions, *Guaranty Trust Co. v. York*, 326 U. S. 99.

Thus, following the course chartered by this Court and applying its guiding principles to the facts in this case, the petitioner submits that the solution to the problem here should present little, if any, difficulty.

Surely, under our Federal system of jurisprudence it cannot be contended that the outcome of litigation in the Federal courts would be substantially changed merely because a case is tried by the court rather than by jury. The litigants in the Federal courts are surrounded by the same safeguards, whether the issues be tried by court or jury. The differences, if any, between trial by court or trial by jury are merely incidental and insignificant, and would not, and should not, affect the outcome of litigation. This case is unlike *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 199, where this Court concluded that the differences between judicial determination and arbitration were so great that the outcome of litigation would be substantially affected by compelling disputes to be settled by arbitration rather than by judicial determination. In discussing the differences between arbitration and judicial determination, Mr. Justice Douglas pointed out that arbitrators do not have the benefit of judicial instruction on the law; they need

not give their reasons for the result; the record of the proceedings is not complete; and judicial review is limited—differences which do not exist between trial by jury and trial by court in the Federal courts.

Trial either by court or by jury is nothing more than the mode or manner of determining the substantive rights and duties of the parties, and for the sake of uniformity of procedure and practice in the Federal courts which the Rules were designed to accomplish where, as here, no substantial rights of the litigants are affected, petitioner submits that the Federal practice should govern. *Erie v. Tompkins, supra; Herron v. Southern Pacific Co.*, 283 U. S. 91; *Ettleson v. Metropolitan Life Ins. Co.* (C. A. 3), 137 F. (2d) 62; *Bowie v. Sorrell* (C. A. 4), 209 F. (2d) 49; 5 Moore's Federal Practice, Section 38.08 (6); See *Lumberman's Mutual Casualty Co. v. Elbert*, 348 U. S. 48, 52, where this Court recognized the "differing standards of review on appeal of a jury verdict in the Louisiana and Federal courts" which were apparently treated as matters of procedure rather than substance.

For the foregoing reasons, apart from the reasons which shall be treated under the next heading, it is respectfully submitted that the State law cannot govern the mode or manner of trial in the Federal courts.

2. Because Article III of the United States Constitution vests in Congress the sole power of determining the practice and procedure in the Federal Courts and also because of the constitutional limitation of the Seventh Amendment.

It has been amply demonstrated that the mode of trial in the Federal courts is a procedural matter which under the *Erie* doctrine and the Federal Rules is governed by the Federal and not the State rules of practice and procedure. And if any doubt exists as to whether the State or Federal law should be applied in determining the mode of trial in

a Federal district court, petitioner submits that such doubt vanishes upon consideration of the provisions of Article III and the Seventh Amendment of the United States Constitution.

Under Article III of the Constitution, "Congress possesses the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States". Ex Parte New Orleans City Bank, 3 How. 317, 11 L. Ed. 603. Congress has exercised this power by giving Federal courts, particularly the U. S. Supreme Court, broad rule making powers for practice and procedure, 28 U. S. C. 2072, *Sibbach v. Wilson & Co.*, 312 U. S. 1. And under the Seventh Amendment the right to trial by jury is preserved.

The *Erie case*, at page 78, clearly excepts from the rule requiring Federal courts to follow State court decisions those "matters governed by the Federal Constitution or by Acts of Congress". And in *Guaranty Trust Co. v. New York*, 326 U. S. 99, 105, 106, Mr. Justice Frankfurter made it clear that the substantive rights of litigants as declared by state law when enforced in the Federal courts are always subject to restrictions, *inter alia*, the constitutional right to trial by jury, citing *Whitehead v. Shattuck*, 138 U. S. 146. Mr. Justice Frankfurter clearly expressed the applicable principle when he stated, "State law cannot define the remedies which a federal court must give simply because a federal court in a diversity jurisdiction case is available as an alternative tribunal to the State courts."

It is thus clear from the foregoing authorities that the mode or manner of trial is not only a procedural matter governed by the Federal law, but also pertains to "matters governed by the Federal Constitution or Acts of Congress" which can not be changed or invaded by State law.

CONCLUSION

For the foregoing reasons and for the reasons stated in the original and reply briefs of petitioner, it is respectfully submitted that the judgment of the Court below should be reversed and that of the District Court should be affirmed and reinstated.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1956

NO. 57

JAMES EARL BYRD, *Petitioner,*

Versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Greenville, S. C.
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Supreme Court of the United States

OCTOBER TERM, 1956

NO. 638

JAMES EARL BYRD, *Petitioner*,

Versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals is not yet reported but is printed in full in the petitioner's appendix to the Petition for a Writ of Certiorari. (pp. 19-35).

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C., Section 1254.

We respectfully submit that the jurisdiction of this Court should not be invoked for the reasons hereinafter set forth.

QUESTIONS PRESENTED

The Respondent will reply to the questions as phrased and presented by Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 *U. S. C.* 2106.

> "The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, *Workmen's Compensation, Code of Laws of South Carolina*, 1952.

> "Sec. 72-101. When Acceptance of Provisions Presumed.
>
> "Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, no-

tice to the contrary in the manner provided in Section 72-105.

"Sec. 72-111. Liability of Owner to Workmen of Subcontractor.

"When any person, in this section and Sections 72-113 and 72-114 referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"Sec. 72-114. Construction When Proceedings are Against Owner or Contractor.

"When compensation is claimed from or proceedings are taken against an owner or contractor, then, in the application of this Title, reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed."

"Sec. 72-121. Employee's Rights Under Title Exclude All Others Against Employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-123. Only One Remedy Available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

1952 *Code of Laws for South Carolina,* Chapter 15, Rural Electric Cooperative Act.

"Sec. 12-1021. For What Purpose Organized.

"Cooperative non-profit membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas."

"Sec. 12-1025. Powers of Cooperative.

"In addition to the powers conferred on all private corporations by Sec. 12-101 a cooperative shall have power:

"(5) To construct, purchase, take, receive, lease as lessee or otherwise acquire, to own, hold, use, equip, maintain, and operate to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge or otherwise dispose of or encumber electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, lands, buildings, structures, dams, plants and equipment and any and all kinds and classes of real or personal property whatsoever which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

"(8) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including, without limitation of the generality of the foregoing, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect to the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof upon corporations construction or operating electric transmissions and distribution lines or systems;

"(10) To conduct its business and exercise any or all of its powers within or without this State; and

"(11) To do and perform any and all other acts and things and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized."

STATEMENT OF CASE

This action was brought by Petitioner to recover damages for personal injuries against Respondent, a South Carolina Corporation organized and operating under the provisions of the *Rural Electric Co-operative Act of South Carolina*, as set forth in Chapter 15 of Volume I of the *Code of Laws of South Carolina*, 1952 (Sections 12-1001, et seq.) The Petitioner was an employee of a contractor engaged in doing certain construction work for Respondent pursuant to a written contract.

On motion of Respondent, the suit was dismissed by Honorable C. C. Wyche, United States District Judge, 118 F. Supp. 868, on the ground that Respondent was not subject to liability for tort under the law of South Carolina. The judgment of the District Court was reversed by the Court of Appeals and the case remanded for further proceedings, 215 F. (2d) 542. Certiorari was denied by the Supreme Court on January 10, 1955, 348 U. S. 915.

In its original Answer, Respondent set up as a defense that Petitioner had been compensated for his injuries under the South Carolina Workmen's Compensation Law. Petitioner moved to strike the defense and on October 6, 1955 Respondent noticed a motion to amend the allegations in its Answer with respect to the defense under the Workmen's Compensation Act. These motions were heard on November 5, 1955 and by Order dated November 11, 1955, Petitioner's motion was denied and Respondent's motion was granted.

On the trial, testimony and evidence supporting the issue made by the affirmative defense under the Workmen's Compensation Act was offered by A. J. Hurt, Respondent's Manager and E. V. McMahon, the Chief Engineer on the work being done under the contract, along with other witnesses and documentary evidence. This testimony of Respondent was not disputed, the basic defense being that Petitioner's recovery was limited to the benefits provided by the *Workmen's Compensation Act of the State of South Carolina*, Title 72 of the *South Carolina Code of* 1952. That statute provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the

execution of the whole or any part thereof, the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him. (Section 72-111)

On trial at the close of Respondent's testimony, Petitioner moved to strike the defense or for the direction of a verdict thereon. At this point and prior to deciding the motion, contrary to a statement in the Petition, the District Judge queried Petitioner's counsel as to any reply testimony the Petitioner might have to offer and warned of the prospect of a motion by Respondent for the direction of a verdict. Petitioner's motion was granted. Thereupon, Respondent was allowed an exception to the Court's ruling and made a motion for the direction of a verdict on grounds expressly including the issue made by the said affirmative defense. The District Judge stating that the motion might be made to cover and include the subject issue.

The Court overruled Respondent's motion and upon a verdict being returned for Petitioner, Respondent thereafter moved for judgment notwithstanding the verdict upon grounds including the said defense and such motion was likewise overruled.

In the District Court, both Petitioner and Respondent took the position that, whether the work being done in the construction of facilities for Respondent was a part of its trade and business within the meaning of the *South Carolina Workmen's Compensation Act*, was a question of law for the Court. Each took the same position before the Court of Appeals. The present and different position of Petitioner was taken for the first time in his Petition for a rehearing to the Court of Appeals.

ARGUMENT

REASONS FOR REFUSING THE WRIT

1. *The Court Of Appeals Has The Power To Reverse The District Judge In His Granting Of A Motion And To Direct Entry Of Judgment Against Party Making Such Motion To Dismiss An Affirmative Defense While Simultaneously Electing Not To Offer Reply Testimony*: The Petitioner contends that his action in the District Court in moving to strike one of Respondent's affirmative defenses at the conclusion of its testimony and in electing not to offer reply testimony thereto, if he had any, divested the Court of Appeals of the power to reverse the judgment of the District Court and to direct entry of judgment for Respondent on the defense it had alleged and established in bar of the Petitioner's action.

The Petitioner elected to make the motion to strike and when to make it. Surely, if he had testimony to offer on the issue raised by the defense, he could and should have offered such evidence before making the motion. Evidently Petitioner had no favorable testimony to offer. It was apparent to Petitioner that Respondent would make a motion for the direction of a verdict on grounds including the subject affirmative defense under the South Carolina Workmen's Compensation Act. The District Judge queried Petitioner's counsel on the matter of reply testimony and warned them as to the prospect of Respondent's motion for a directed verdict, stating it was a question of law, there being no conflict in the testimony. The answer given the Court by Petitioner's counsel is revealing and these developments occurred prior to the granting of the motion to strike. (R. 354, 355; Respondent's Appendix p. 19-20)

Here the case was tried by the District Court with opportunity afforded the litigants to produce all available evidence, to cross-examine witnesses and to exercise all other privileges and rights enjoyed in a trial. We submit that the power and authority of the Court of Appeals was clear to reverse the District Court and order judgment for the Defendant, Respondent herein, under the provisions of 28 *U. S. C.* 2106; 28 *U. S. C. A.* 2106; under which statute for the first time the power of the

Supreme Court and the Court of Appeals to enter judgment when remanding a case to the lower Court is set out in identical language in a single section. *Bryan v. U. S.*, 70 S. Ct. 317; 338 U. S. 552.

2. *There Was No Invasion Of The Province Of The Jury Contrary To The Seventh Amendment To The United States' Constitution In The Action Of The Court Below And The Procedure Was Consistent With Applicable Federal Procedure:* The motion made by Petitioner was at the conclusion of all the testimony in the case. It must be considered in the light of a motion for a directed verdict on the particular defense to which the motion was directed. The Respondent also made a motion for a directed verdict on grounds of this same defense. (R. 359-360; Respondents Appendix p. 20-21). The District Judge expressly held the issue to be a question of law, there being no conflict in the testimony. Such a request by each party for a final ruling in his favor is equivalent to a joint request for a finding of fact by the Court and the decision is conclusive. *Williams v. Vreeland*, 244 Fed. 346; 156 C. C. A. 632, affirmed 38 S. Ct. 438; 250 U. S. 295.

It is a familiar doctrine that where each of the parties to an action request the District Court to instruct a verdict, it would be assumed that both parties affirmed that there was no disputed fact question which would control the question of law involved. *Walsh Const. Co. v. United States Guarantee Co.*, 76 F. 2d 240, (C. A. 8) Certiorari denied, 56 S. Ct. 120, 296 U. S. 605; *National Bank of South Carolina of Sumter v. American Surety Co. of New York*, 67 F. 2d 131 (C. A. 4). Also, it has been consistently held that the action of both sides in moving at the conclusion of the evidence for directed verdict constituted waiver of jury trial. *Positype Corporation of America v. Flowers*, 36 F. 2d 617, Certiorari denied 50 S. Ct. 461, 281 U. S. 762; *Cudahy Packing Co. v. City of Omaha*, 24 F. 2d 3, Certiorari denied 49 S. Ct. 9, 278 U. S. 601.

It is significant that in his brief in the Court below, the Petitioner contended "Trial Judge was correct in withdrawing issue of application of Sections 72-111 and 72-121 of the *South Carolina Workmen's Compensation Act* as a bar to Appellee's

(Petitioner) action and concluding *as a matter of law* that these sections of the Act did not apply to the facts in the instant case as a bar to Appellee's action." The very issue upon which Petitioner now claims he is entitled to a determination by jury was withdrawn from the jury in the District Court upon his own motion and he made the claim of the right for the first time in his Petition for Rehearing in the Court below. The District Judge held the question to be one of law without a dispute as to the facts and the Respondent moved for a directed verdict upon the same issue. Subsequently, and in due time, the Respondent moved upon the same ground for judgment in favor of the Defendant notwithstanding the verdict. The appeal to the Court of Appeals was from the refusal of Respondent's motion for judgment notwithstanding the verdict and included this same ground.

In his Petition, Petitioner has made and repeated so many unfounded statements with respect to the testimony touching the issue involved, that we feel justified in asking the Court's indulgence here to quote from the opinion of the Court below in its summation of relevant facts on the issue relating to the *South Carolina Workmen's Compensation Law* and the work being done constituting a part of the trade and business of Respondent. (Petitioner's Appendix pp 24-26):

> "The uncontradicted evidence as to the construction work done by the employees of Blue Ridge may be summarized as follows: It maintains an outside crew of 8 linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It constantly builds new lines to new consumer members and builds extensions, some short and some long, up to eight miles in length; but since the end of World War II so many persons in rural areas have demanded electrical service that it has employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. All of the construction work, whether done by itself or by outside contractors, is done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which is employed

by Blue Ridge to make sure that the system complies with the requirements of the Rural Electrification Administration of the United States.

"The testimony with respect to the construction of the substations of Blue Ridge, stated most favorably to the appellee, discloses that originally Blue Ridge built three sub-stations with its own facilities, but that all of the sub-stations which were built after the war, including the six it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident it had no one in its direct employ capable of handling the technical detail of sub-station construction.

"There can be no doubt that all of the work covered by the Bouligny contract was of the class which Blue Ridge was empowered by its charter to perform and that all of it was necessary to enable it to serve the growing needs of the rural communities. Furthermore, the main actor in the whole enterprise was the Cooperative itself. This is seen the more clearly when we round out, by way of illustration, the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Blue Ridge secured a loan of $334,300.00 from the United States under the Rural Electrification Act of 1934, as amended, to finance the construction work above described, the lines to be located along such routes as the owner with the approval of the Administrator should designate. Blue Ridge then entered into an engineering service contract with the Southern Engineering Company, whereby the Engineer agreed to render the engineering services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the Engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the Engineer after the procuring of rights of way and easements by the owner, and the supervision by the Engineer of all the details of the construction work as the representative of the owner.

"The construction contract with Bouligny conformed to the requirements of the loan agreement. It defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the

construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the sub-stations were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work.

"From this description there can be no doubt that Blue Ridge was not only in the business of supplying electricity to rural communities, but also in the business of constructing the lines and sub-stations necessary for the distribution of the product, if these words are given their ordinary significance. The appellee says, however, that in the meaning of the compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employees; and reliance is placed on the evidence that since the war Blue Ridge has sublet the construction of sub-stations to outside contractors, and the line work performed by its own employees has been limited in extent. We do not think this interpretation of the statute is tenable. It will be noticed in the first place that 72-111 makes specific provision for the performance by a contractor of work which is part of the owner's business and in such case imposes upon the owner the same liability to pay compensation to the contractor's workmen as if they were immediately employed by him. In other words, the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers. The manifest purpose is to afford the benefits of compensation to the men who are exposed to the risks of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In conse-

quence, both the owner and the contractors whom he engages to do his work, are subjected to the requirements of the Act, and the workers receive double protection."

In this brief we do not propose to enter upon an argument with Petitioner as to facts and weight of the evidence. However, we do not wish the attack upon Mr. A. J. Hurt, Respondent's manager, to go unchallenged. The same unwarranted and unfounded charges are made against Mr. Hurt in the Petition herein which were made in the Court of Appeals. On the trial the testimony supporting the affirmative defense in question was offered by the said A. J. Hurt, E. V. Mahon, the Chief Engineer on the job, the deposition of Ira Moss, the contract between R. H. Bouligny, Inc., a construction company, and Respondent, and other supporting evidence. As heretofore stated, the evidence was not disputed and it was so held by the trial Judge. The only reasonable conclusion to be drawn from the evidence was that the work performed under the contract was clearly done in carrying on the trade and business of the Respondent Cooperative.

3. *The Action Of The Court Below Was In Conformity With Applicable State Law*: The Respondent was incorporated pursuant to a special statute of the South Carolina Legislature (1952 *Code of Laws for South Carolina*, Chapter 15, Rural Electric Cooperative Act) and Section 12-1025 expressly provides for Respondent to undertake and perform the exact type of work that was being done when Petitioner sustained his injury. Under the written contract in evidence, the contractor was constructing and converting lines and building substations and such work falls directly under the powers of the Respondent as prescribed in the statute. The making of the contract and the performance of the work thereunder constituted substantial evidence that Respondent was exercising the powers which it was authorized by special statute to perform. Thus, it necessarily followed that Petitioner was injured while engaged in an operation which entered directly into and became a part of the business of the Respondent for whom the work was being done. *Doane et al v. E. I. DuPont De Nemours & Co.*, (C. A. 4) 209 F. 2d 921.

It was conceded by Petitioner in the Court below that both Respondent (the owner) and Bouligny (the contractor) had complied with and were operating under the Workmen's Compensation Act, and that after the injury the Petitioner had elected to receive and had accepted full benefits thereunder from Bouligny; and it was also conceded that if the work being done at the time of the injury constituted a part of the business of the Respondent Cooperative, the present suit must fail. (R. 11-12; Respondent's Appendix p. 21). Thus the Petitioner admitted into the record all requirements of this defense except one, to-wit: that the work being done by the contractor constituted a part of the trade, business and occupation of the owner, the Respondent in this case.

At the conclusion of Petitioner's testimony in the District Court, the Respondent moved for a directed verdit or involuntary dismissal and at that time, the District Judge ruled that only one question was left open after Petitioner's admissions, that being, "whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done?" (Appellant's Appendix in Court below, p. 31) *Doane, et al v. E. I. DuPont De Nemours & Co.*, supra.

It is well established that the leading case and recognized authority on this issue in South Carolina is the case of *Marchbanks v. Duke Power Co., et al*, 190 S. C. 336, 2 S. E. 2d 825, which was very similar to the present case. The decisions of the Supreme Court of South Carolina are in accord with the decision of the Court below in the present case. The following cases substantially support the position of Respondent and the decision of the Court of Appeals in the present case. ***Boseman v. Pacific Mills, et al,*** 193 S. C. 479, 8 S. E. 2d 878; ***Berry v. Atlantic Greyhound Lines, Inc.*** (C. A. 4), 114 F. 2d 255, 30 F. Supp. 188; ***Purkable v. Greenland Oil Co.***, 122 K. 720, 253 Pac. 219; ***Smith et al v. Fulmer et al,*** 198 S. C. 91, 15 S. E. 2d 681; ***Fox v. Fafnir Bearing Co., et al,*** 107 Conn. 189, 139 A. 778; ***Kennerly v. Ocmulgee Lumber Co.***, 206 S. C. 481, 34 S. E. 2d 792; ***Isthmian S. S. Co. of Delaware v. Olivieri, et al,*** C. A. 5) 202 F. 2d 492; ***McDowell v. Stilley Plywood Co., et al,***

210 S. C. 173, 41 S. E. 2d 872; *Hopkins v. Darlington Veneer Co., et al*, 208 S. C. 307, 38 S. E. 2d 4.

In the Court below the Petitioner relied upon *Sears Roebuck & Co. v. Wallace*, (C. A. 4) 172 F. 2d 802, a case involving the Virginia Compensation Statute, and the Court held that the work being done was not part of the business of the occupant and the occupant was not obliged to provide compensation for the employees of the sub-contractor, but was a stranger to the latter's business. We contend that the *Sears Roebuck & Co.* case was not analogous to the present case as the work being done by Petitioner was part of the trade and business of the Respondent and under no circumstances could Respondent be considered a stranger to the business or the work being done.

It is clear that the subject question was to be determined by the law of South Carolina. The well documented and well considered opinion of the Court below carefully follows the applicable principles of South Carolina law established in *Marchbanks v. Duke Power Co., et al*, supra, and subsequent decisions of the South Carolina Supreme Court cited above. In reply to petitioner's assertion as to deference of the Court of Appeals to the District Court on a question involving application of state law, we submit that the issue here involved was not uncertain and the established principles of law in South Carolina on the subject were eminently clear as was concluded by the Court of Appeals. When the issue here involved was before the District Judge, he stated for the record that he was not familiar with the South Carolina Workmen's Compensation Law and that, at his age, he did not care to attempt to acquaint himself with it. (R. p. 7; Respondent's Appendix, p. 21-22).

While in the District Court, the Petitioner conceded that he had no case if the work in which he was engaged when he was injured was part of the trade or business of Blue Ridge (Respondent), in the Court of Appeals the Petitioner contended for the first time, in the alternative, that even if the work was of this character, he was not precluded from bringing the present action because the contractor (Bouligny) paid the compensation awarded and hence the acceptance of the

award does not bar his suit under the provisions of Section 72-123 of the South Carolina Workmen's Compensation Act. The Court below considered the point after calling attention to the fact that the question was being raised for the first time. In support of this new contention, petitioner cited the case of *Ballard, Administratrix v. Southern Railway Co.*, (unreported, C. A. 5198, D. C. Eastern District of S. C.). The Court below held in accordance with the principles established in *State v. Benjamin F. Bennett Building Co.*, 154 Md. 159, 140 A. 52:

> • • • "The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor, when he was not in law the employer of the injured workman. The result then is that when the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work.
>
> • • • "If an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary."

In the opinion in *Marchbanks v. Duke Power Co.*, supra, the South Carolina Supreme Court discussed this question and, upon reaching the same conclusion said:

> "The best reasoned case that I have found on this question is that of *State v. Benjamin F. Bennett Building Co.*, 154 Md. 159, 140 A. 52, 53. It involves an act similar in principle to that of this State."

Thereafter, the South Carolina Supreme Court quoted extensively from the decision of the Maryland Court.

There can be no doubt but that the Court below was correct in ordering that the motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion for judgment non obstante veredicto should have been granted and, therefore, the judgment of the District Court was properly reversed with direction to enter judgment for the defendant.

CONCLUSION

Succinctly stated, the Petitioner seeks a review by this Court on questions involving (1) trial procedure and (2) South Carolina law. His position as to being deprived of a substantial right by reason of an election made by him at the end of the trial is totally without merit. We further submit that the decision of the Court below on the South Carolina law is eminently correct but, even if we assumed the decision to be error, this Court could not determine whether the Court of Appeals was right or not without making a determination on the record in the case and investigating South Carolina law. We respectfully submit that this honorable Court does not sit to correct an error in a case involving a local controversy under State law.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RAY R. WILLIAMS,
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Counsel for Respondent

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I, Miller C. Foster, Jr., Clerk of the United States District Court for the Western District of South Carolina, do hereby certify that I have examined the portions of the Transcript of Record herein printed in this Appendix and the same are true and correct.

Miller C. Foster

Clerk,
United States District Court
Western District of South Carolina

EXCERPTS FROM RECORD AT TIME OF PETITIONER'S MOTION AT CONCLUSION OF TESTIMONY

(Transcript of Record, pp. 354-355)

"*The Court*: In the event I overrule your motion, do you contemplate putting up any testimony in reply? You have that right, of course. On this point, I mean.

"*Mr. Hammer*: We haven't discussed it, but we are making that motion. I frankly don't know at this point of any reply that is necessary. I don't know of any evidence in this case . . .

"*The Court*: I am inclined to think so far it is a question of law but I will hear from Mr. Walker on that. I don't know of any issue of fact to submit to the jury. It seems to me under the testimony here there has been—I don't know of any conflict in the testimony, so far as that's concerned, so far.

"*Mr. Hammer*: I listened carefully to the last witness, and . . . .

"*The Court*: Do you agree with that, Mr. Walker, that that is a question of law?

"*Mr. Walker*: I think it is a question of law because there has been no evidence presented by the plaintiff to dispute the position.

"*The Court*: The reason I am making that inquiry as to whether you intend to put up any more testimony in the event I overrule your motion, counsel may wish to move for a directed verdict on that ground since it is a question of law. But that is his prerogative after all the evidence is in. Of course, he can't move for a directed verdict as long as you have a right to reply.

"*Mr. Hammer*: We are moving at this time in the nature of a voluntary dismissal.

"*The Court*: You move to dismiss the defense?

"*Mr. Hammer*: Yes, sir, at this stage of the game.

"*The Court*: What do you say, Mr. Walker?

"*Mr. Walker*: Your Honor please, we say that the evidence could not be more clear, that the de-

fendant co-op was in the business that is covered by this contract; that is, the work that was being performed."

(Transcript of Record, p. 359):

"*Mr. Walker*: We are necessarily confined to and referring to the types of construction being performed by Bouligny under the particular contract and we say that the defendant was engaged in the same types of construction that were provided for under that contract.

"*The Court*: I can't follow you on that. Anything else you have to say, gentlemen? I will have to grant the motion. I allow you an exception. Bring in the jury. (12:55 P. M., Jury returns to open Court.)

"*The Court*: Anything in reply?

"*Mr. Edens*: Nothing, your Honor."

RESPONDENT'S MOTION SUBSEQUENT TO GRANTING OF PETITIONER'S MOTION

(Transcript of Record, pp. 359-360)

"*The Court*: Since the testimony closed, do you have any motions, Mr. Walker?

"*Mr. Walker*: Yes, sir, I wish to make a motion for a directed verdict.

"*The Court*: I will allow you to include in that Motion for Directed Verdict your defense which I have stricken, if you desire. In other words, I will allow you to include a motion for directed verdict on the ground that all the testimony shows whatever you want to put in it. In other words, you can add to it, to reserve your rights. Of course, you could make it on the other. I will allow you to make it if you want to.

"*Mr. Walker*: Yes, sir, I do so desire to make a motion for directed verdict. First, for the record, I wish to include . . .

"*The Court*: The same grounds you made the motion for involuntary dismissal?

"*Mr. Walker*: All those grounds."

ADMISSIONS BY PETITIONER INTO RECORD WITH REGARD TO DEFENSE UNDER SOUTH CAROLINA WORKMEN'S COMPENSATION ACT

(Transcript of Record, pp. 11-12)

"*Mr. Hammer*: I will admit that the defendant elected to come under the Act.

"*Mr. Walker*: He admits we are operating under the Act.

"*Mr. Williams*: As I understand, it is admitted this, then: that both Blue Ridge and Bouligny elected to and came under Workmen's Compensation. That is admitted on the record.

"*The Court*: Right.

"*Mr. Williams*: The only other question left would be whether or not this was part and parcel of the business of Blue Ridge. In other words, was—the only question that would be left is: in the meaning of the Workmen's Compensation Act, was the plaintiff the employee of Blue Ridge Electric? That would be the only question left.

"*Mr. Hammer*: That's correct.

• • • •

"*Mr. Walker*: In the event that—let me state it this way: as I understand him, he is admitting that if this business that was being done by Bouligny, the independent contractor, constituted a part of the trade, business and occupation of Blue Ridge, then we have a complete defense?

"*The Court*: That's right.

"*Mr. Hammer*: That's correct."

STATEMENT BY DISTRICT JUDGE WITH REGARD TO DEFENSE OF RESPONDENT UNDER SOUTH CAROLINA WORKMEN'S COMPENSATION ACT

(Transcript of Record, p. 7)

"*Mr. Hammer*: The only thing that makes a difference is if he is an employee within the meaning of the Act, employee of the trade, business or profession of the defendant, if he is . . .

"*The Court*: He can prove that, can't he?

"*Mr. Hammer*: And that's as far as he's got to go to sustain his defense and if he doesn't sustain his defense . . .

"*The Court*: Let me see if I follow you, because I don't know anything about this Workmen's Compensation Law and don't want to learn except for this case. I don't know anything about it and I am not at my age trying to learn something about it."

Supreme Court of The United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, *Petitioner*,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON MERITS FOR RESPONDENT

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Supreme Court of The United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (R. 71) is reported in 238 F. (2d) 346.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956 (R. 71). The Petition for Rehearing was denied on November 15, 1956 (R. 82). The Petition for a Writ of Certiorari was filed on December 19, 1956, and was granted on February 25, 1957 (R. 83). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 *U. S. C.* 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72, *Workmen's Compensation, Code of Laws of South Carolina*, 1952.

"Sec. 72-101. When Acceptance of Provisions Presumed.

"Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner provided in Section 72-105.

"Sec. 72-111. Liability of Owner to Workmen of Subcontractor.

"When any person, in this section and Sections 72-113 and 72-114 referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any work-

man employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"Sec. 72-114. Construction When Proceedings are Against Owner or Contractor.

"When compensation is claimed from or proceedings are taken against an owner or contractor, then, in the application of this Title, reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed."

"Sec. 72-121. Employee's Rights Under Title Exclude All Others Against Employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-123. Only One Remedy Available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

1952 *Code of Laws for South Carolina*, Chapter 15, Rural Electric Cooperative Act.

"Sec. 12-1021. For What Purpose Organized.

"Cooperative non-profit membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas."

"Sec. 12-1025. Powers of Cooperative.

"In addition to the powers conferred on all private corporations by Sec. 12-101 a cooperative shall have power:

"(5) To construct, purchase, take, receive, lease as lessee or otherwise acquire, to own, hold, use,

equip, maintain, and operate and to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge or otherwise dispose of or encumber electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, lands, buildings, structures, dams, plants and equipment and any and all kinds and classes of real or personal property whatsoever which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

"(8) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including, without limitation of the generality of the foregoing, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect to the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof upon corporations constructing or operating electric transmissions and distribution lines or systems;

"(10) To conduct its business and exercise any or all of its powers within or without this State; and

"(11) To do and perform any and all other acts and things and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized."

RURAL ELECTRIFICATION ACT OF 1936

"Sec. 4. The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, State Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 3 (d) and 3 (e) but without

regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas to discharge or refinance long term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended: *Provided*, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this Act. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided further*, That all such loans shall be self liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further*, That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 5 shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed."

(May 20, 1936, ch. 432, #4, 49 Stat. 1365; Sept. 21, 1944, ch. 412, Title V, #502 (a), 503, 58 Stat. 739, 740; Dec. 23, 1944, ch. 725, 58 Stat. 925, 926; June 29, 1948, ch. 703, 62 Stat. 1070; Oct. 28, 1949, ch. 776, #4 (e), 63 Stat. 948; June 15, 1955, ch. 139, 69 Stat. 132.)

QUESTIONS PRESENTED

I

Was it established by the evidence that Petitioner sustained the injuries of which he complains while engaged in work which constituted a part of Respondent's trade, business or occupation and was his recovery limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina?

II

Did the question of whether Petitioner's injuries were sustained while he was engaged in work which constituted a part of Respondent's business, trade and occupation constitute a question of law for the Court and not an issue of fact for the jury?

III

Does the Petitioner, whose motion in the District Court to strike an affirmative defense was granted and who was simultaneously offered an opportunity to present reply testimony on the same defense upon which the Respondent based a motion for a directed yerdict which was overruled, have the right to a new trial upon the ground that Appellate Court did not have the power to reverse the rulings of the District Judge with direction to enter judgment for the defendant?

STATEMENT

In this action the petitioner brought suit to recover damages for bodily injuries against respondent, a South Carolina corporation organized and operating under the provisions of the Rural Electric Co-operative Act of South Carolina, as set forth in Chapter 15 of Volume 1 of the 1952 *Code of Laws of South Carolina* (Sections 12-1001, et seq.). The petitioner was an employee of a contractor, R. H. Bouligny, Inc., engaged in doing certain construction work for respondent pursuant to a written contract (defendant's Ex. "C;" R. 23-28, 206).

At the time of the accident on February 17, 1953, the

petitioner was performing work for his employer under its contract with respondent. The petitioner's complaint alleged that respondent was engaged in the business of supplying, transmitting and distributing electric power and that petitioner was engaged in construction work at or near a sub-station owned by respondent near Walhalla, South Carolina. The original complaint alleged damages in the sum of One Hundred Sixty-Four Thousand Dollars ($164,000.00) and immediately preceeding trial, the District Judge allowed the petitioner to amend his complaint by increasing the amount of damages alleged to the sum of Two Hundred Thirty-Three Thousand, Nine Hundred Forty-Six and 65/100 Dollars ($233,946.65). In its original answer, the respondent set up as a defense that petitioner had been compensated for his injuries under the South Carolina Workmen's Compensation Law. The petitioner moved to strike the defense and at approximately the same time, the respondent noted a motion to amend the allegations in its answer with respect to the defense under the Workmen's Compensation Act by making additional allegations in this regard. These motions were heard on November 5, 1955 and by the Order dated November 11, 1955 the petitioner's motion to strike was denied and respondent's motion to amend was granted. In its answer (R. a-c) the respondent denied any negligence on its part and alleged that any negligence that may have occurred to cause petitioner's injuries was solely that of the said R. H. Bouligny, Inc., the employer of the petitioner; that Bouligny, Inc. and respondent were properly qualified and operating under the South Carolina Workmen's Compensation Act and petitioner had filed claim in the manner provided by law and collected full benefits from the said employer; that the work being done pursuant to said written contract at the time and place of petitioner's injuries was a part of the trade and business of the respondent. Therefore, the petitioner had no right to recover against respondent in a common law action but petitioner's rights were limited to and determined by the South Carolina Workmen's Compensation law. The respondent further contended contributory negligence on the part of the

petitioner and that petitioner's injuries were an unavoidable accident insofar as respondent was concerned.

The Workmen's Compensation Act of South Carolina, title 72 of the *South Carolina Code of* 1952, provides that when an owner undertakes to execute any work which is a part of his trade or business and contracts with any other person for the execution for the whole or any part thereof the owner shall be liable to pay to any workman employed in the work any compensation under the Act which he would have been liable to pay if the workman had been immediately employed by him (Section 72-111). At the conference before the District Judge immediately preceding the beginning of the trial (R. 1-5), and at which all counsel were present, the petitioner's counsel admitted into the Record all requirements of this complete defense under the South Carolina Workmen's Compensation Act except one, to-wit, that the work being done by the contractor, Bouligny, Inc., constituted a part of the trade, business and occupation of the owner, the respondent in this case. Thereupon, the District Judge ordered that all testimony and evidence, including pertinent allegations in the answer by the respondent as to this defense, be excluded from the jury and testimony was allowed only as to the one requirement mentioned above, not admitted by petitioner. Reference is made to the footnote under respondent's answer as printed in the Transcript of Record (R. b-c). In the District Court the petitioner and the respondent contended and the District Judge concluded that, whether the work being done in the construction of facilities for respondent pursuant to said written contract was a part of its trade and business within the meaning of the South Carolina Workmen's Compensation Act was a question of law for the Court (R. 5, 48, 49). In this connection the petitioner in his brief in the Court below contended "Trial Judge was correct in withdrawing issue of application of Sections 72-111 and 72-121 of the *South Carolina Workmen's Compensation Act* as a bar to Appellee's (Petitioner) action and concluding *as a matter of law* that these sections of the Act did not apply to the facts in the instant case as a bar to Appellee's Action."

The respondent, Blue Ridge Rural Electric Co-operative, was organized as an electric co-operative in 1939, under the provisions of the Rural Electric Co-operative Act of South Carolina, Chapter 15 of the *South Carolina Code of Laws of* 1952. Section 12-1021 of this Statute authorizes the organization of co-operative non-profit membership corporations for the purpose of supplying electric energy and extending its use in rural areas. At the time of its organization, respondent took over about 300 miles of line and approximately 1100 consumers from the South Carolina State REA and commenced operating and, as a part of its operation, launched upon a construction program for the expansion of its system and service which has been continuous to the present time. At the time of the trial in the District Court in 1955 respondent had 2,000 miles of line and 10,816 consumers or members. Section 12-1025 of the South Carolina Rural Electric Co-operative Act empowers a co-operative to operate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment, and any and all kinds of property which may be necessary or convenient to accomplish the purposes for which the corporation is organized. The construction work which had been carried on in connection with the enlargement of respondent's system, has been done by its own employees and by contractors, working from time to time under special contracts. The testimony disclosed that respondent maintains an outside crew of 8 linemen and 8 groundmen, one-third of whose time is spent in maintenance and two-thirds in construction work. It owns nineteen pieces of equipment which it uses in connection with its construction work and its other operations. It constantly builds new lines to new consumer members and builds extensions of varying length up to 8 miles. However, after the end of World War II so many persons in rural areas demanded electrical services that respondent employed independent contractors to do a large part of the construction work, while continuing to do a considerable part through its own men. (R. 29-34; 42-46). Its own employees do and have done every type and character of

construction which has gone into its distribution system. Even when the work is done by contract, much detail is involved for it, such as arranging for the making of plans and specifications for the work, the securing of rights of way and franchises, the application for funds, the advertising for bids, the letting of the contract, the purchasing and handling of materials used on the project, the checking of reports filed by the contractor and the engineer, and the disbursement of funds as the work progresses. All of the construction work, whether done by respondent or by outside contractors, was done under the supervision of the Southern Engineering Company, an independent organization conducted by engineers, which was continuously employed by respondent to make sure that the system complied with the requirements of the Rural Electrification Administration of the United States. The construction work is financed with funds borrowed from the United States Government through the National Rural Electrification Administration. On June 23, 1952 in order to expedite its construction work the respondent let a contract to R. H. Bouligny, Inc., a contractor, for the construction of approximately 24.19 miles of new line and 87.69 miles of conversion, two appurtenant sub-stations and a breaker station. Under the provisions of the contract, the respondent furnished the materials used in constructing the sub-stations and the contractor furnished the labor. The sub-stations were constructed on property owned by the respondent and the work was done under the supervision of Southern Engineering Company, as provided in said contract with R. H. Bouligny, Inc., and in a contract between respondent and the Southern Engineering Company. The contract between respondent and the contractor set out in detail the procedure to be followed in connection with the work to be done and the safety rules required for the protection of the contractor's employees (defendant's Exhibit "C;" R. 23-29).

In this action we are concerned with a line on which the contractor did conversion work. The line was converted from a one-phase line to a two-phase line. A one-phase line consists of one wire and a two-phase of two wires, etc. The line in question was a transmission line which provided electric energy for the

residents of a rural community known as the Ebenezer community and the evidence in the case identifies this line as the Ebenezer line. The conversion required the relocation of a portion of the Ebenezer line where it left the highway and the running of a new line from the new connecting point to the sub-station which was also under construction and identified under the contract as the Walhalla sub-station. It was necessary to do the work in such a manner as to continue the service to the Ebenezer community as far as it was possible to do so. The construction contract especially provided in this respect that at the beginning of each day the contractor would notify the owner of the lines to be de-energized and at the end of each day the contractor would notify the owner of the lines to be re-energized. On the day of the accident the Walhalla sub-station was nearly finished but it had not been released by the contractor to the owner. The wires running from the sub-station to the new connecting point on the Ebenezer line were also in place and one of them received current from another source and was used to service the community. This line was brought from the connecting point to a double-end pole located within the fenced area of the sub-station at a distance of 75 feet, and ran thence to the sub-station itself. It was intended that the current should not run to the sub-station but should be cut off at the pole by postponing the installation of a connecting device thereon, known as a jumper, until the sub-station was completed. Through a mistake of a foreman of the contractor, a permanent closed jumper was placed on the pole and thus the current ran through the 75 foot span of wire to the insulators to which the wire was attached on the outside of the sub-station structure.

This accident occurred when the petitioner went to the sub-station in company with his foreman, and upon direction, the petitioner climbed up the sub-station to make a connection to a point inside the sub-station from the wires on the outside of said sub-station that were connected to the insulators as aforesaid and extended from the pole 75 feet away. It is significant that the sub-station was not energized and the petitioner

climbed up its metal framework without hazard. However, the petitioner proposed to make a measurement to determine the length of wire required to make a connection and when he reached out and contacted the wire connected to the insulators on the outside of the sub-station, he was severely injured.

The court below concluded that the testimony with respect to the construction of the sub-stations of the respondent, stated most favorably to the petitioner, discloses that originally respondent built three sub-stations with its own facilities, but that all of the sub-stations which were built after the War, including the six which it was operating at the time of the accident, were constructed for it by independent contractors, and that at the time of the accident respondent had no one in its direct employ capable of handling the technical detail of sub-station construction.

At the conclusion of the respondent's case, the petitioner moved to strike the defense that defeated his claim by reason of the fact that he was engaged in work which was a part of the trade, business and occupation of the respondent within the meaning of the South Carolina Workmen's Compensation Act (R. 48). The District Judge inquired of respondent's counsel at that time if they contemplated offering any testimony in reply and he stated that he did not know of any reply that was necessary. The District Judge stated that the issue was a question of law (R. 48) and after hearing from counsel for respondent, he granted the motion. It is clear from the Record (R. 49, 50, 51, 52) the District Judge took the view that the construction work of respondent by its own employees or through an independent contractor did not constitute a part of its business, trade and occupation, because it did not carry on such work by contract for third parties.

After this motion to strike was granted, in response to the Court's inquiry, the Petitioner advised that they had nothing in reply (R. 52). Thereupon the respondent moved for a directed verdict and the Court allowed respondent to include as a ground in its motion the defense which had been stricken (R. 52, 53, 54). This motion was denied and the case was

submitted to the jury on the sole issues of negligence and contributory negligence. The jury returned a verdict of $126,786.80 in favor of petitioner and in due time the respondent moved for judgment non obstante veredicto or for a new trial and the same was denied. The judgment was duly entered and the respondent appealed to the Court below. On appeal, the Court below concluded there was no doubt that respondent was not only in the business of supplying electricity to rural communities but also in the business of constructing the lines and sub-stations necessary for the distribution of the product, if these words are given their ordinary significance. The Court below further concluded that there could be no doubt that all of the work covered by the Bouligny contract was of the class which respondent was empowered by its Charter to perform and at the time of the accident resulting in the injury to petitioner, the work being done was a part of the trade, business and occupation of the respondent.

The Court below further stated it was abundantly proved that the accident was caused primarily by the negligence of employees of the Bouligny Company, which is not a party to the instant suit. The Opinion stated that the sufficiency of the evidence to show negligence on the part of the co-operative was not free from doubt, but that it was not necessary to decide this point in view of the basic defense that the petitioner's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina. The Court below repudiated the contention of the Petitioner that in the meaning of the Compensation statute, construction work is not a part of an owner's business, unless it is of such a character that ordinarily it would be performed by his own employees. The petitioner was relying on evidence that since the War respondent has sub-let the construction of sub-stations to outside contractors, and the line work performed by its own employees had been limited in extent. The Court held that the statute recognizes the practice of letting out to others the actual performance of one's business and subjects the owner to liability for compensation to injured workers, the manifest purpose being to afford the benefits of compensation to the men who are

exposed to the risk of its business, and to place the burden of paying compensation upon the organizer of the enterprise. In consequence, both the owners and the contractors whom he engages to do his work, are subjected to the requirements of the Act and the workers receive double protection. The Court held that the motion of the defendant in the District Court for a directed verdict in its favor should have been granted and, failing this, the subsequent motion of the defendant for judgment in its favor non obstante veredicto should have been granted. The judgment of the District Court was reversed with direction to enter judgment for the defendant.

SUMMARY OF ARGUMENT

The evidence in the case at bar conclusively establishes that Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's trade and business. At the conference before the District Judge immediately preceding the trial, admissions were made by Petitioner that the Respondent, Blue Ridge Electric Cooperative, Inc., and the contractor, R. H .Bouligny, Inc. were duly filed and operating under the South Carolina Workmen's Compensation Act (1952 Code of Laws, Title 72); that the Petitioner elected to receive and accepted full benefits provided by the Compensation Law and that Respondent occupied the status of owner under the Act, provided the work being done when Petitioner's injury occurred constituted a part of the trade, business and occupation of the Respondent. At the conclusion of Petitioner's testimony when Respondent moved for an involuntary dismissal and directed verdict, the Distri' Judge ruled that only one question was left open on this issue after Petitioner's admissions, that being, "whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done?" *Doane, et al v. E. I. DuPont deNemours & Co.* (C.A. 4th) 209 F. 2d 921.

It is well established under the applicable authorities that if the work in which Petitioner was engaged at the time of his accident and injury constituted a part of the business of

the Respondent, recovery is limited to the benefits provided by the Workmen's Compensation Act and this action at common law against the Respondent could not be maintained. *Marchbanks v. Duke Power Co., et al,* 190 S.C. 336, 2 S.E. 2d 825; *Kennerly, et al v. Ocmulgee Lumber Co., et al,* 206 S.C. 481, 34 S.E. 2d 792; *Boseman v. Pacific Mills,* 193 S.C. 479, 8 S.E. 2d 878; *Adams v. Davison-Paxon Co.*. 230 S.C. 532, 96 S.E. 2d 566.

The Respondent is a rural electric cooperative, organized under the provisions of the Rural Electric Cooperative Act of South Carolina (1952 Code of Laws for South Carolina, Chapter 15), and has, with its own employees and by contracts, let from time to time, constructed a large electric distribution system, with funds borrowed from the United States Government through the National Rural Electrification Administration. The construction and maintenance work, which Respondent has carried on in enlarging its distribution system, has been and is essential to the successful and proper operation thereof.

Under the provisions of the Rural Electric Cooperative Act of South Carolina, the Respondent is vested with the power, among other things, to generate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings and equipment and any and all kinds of property which may be necessary and convenient to accomplish the purpose for which it was organized. When the procedure is examined it becomes clear that the moving force and chief actor in the entire matter was the Respondent. The project was begun when Respondent secured a loan of $334,300.00 from the United States Government under the Rural Electrification Act of 1934, as amended, to finance certain construction work. Under the subject contract the construction was performed by R. H. Bouligny, Inc. including the portion on which Petitioner was working when he sustained his injuries. The evidence conclusively shows that the work being done was essential to and became an integral part of Respondent's electric distribution system. The Respondent carries on and has carried on

continuously, with its own employees, the construction of every type facility which has gone into and makes up its operating electric distribution system, including those constructed under the Bouligny contract. The construction work, in its various aspects and types, which is carried on and has been carried on by Respondent, goes hand in hand with the distribution and sale of its product, electric energy, each being essential and complementary to the other in such operation.

The Petitioner contends that the construction work, particularly of the sub-station he had climbed when his injuries occurred, was completely separate and distinct from Respondent's business, trade or occupation. He was not injured by the sub-station as it was not energized. The sub-station was merely serving as a platform which he had climbed and he was injured by the line on the outside of the sub-station. The contractor was constructing the line. However, in arguing negligence on the part of Respondent in the trial Court, the Petitioner contended a duty of performance on Respondent's part in connection with the particular work being done. Thus, he asserted that the construction work constituted an integral part of Respondent's business and that Respondent was required to and did participate in the work with its own employees. If Petitioner produced any evidence of negligence on the part of Respondent in connection with the work being done and as to what Respondent did or failed to do through its employees, at this particular place, it would necessarily follow that the work being done constituted part of Respondent's trade and business.

At the close of Respondent's testimony, the Petitioner elected not to offer any reply testimony and moved to strike Respondent's affirmative defense based upon the terms and provisions of the Workmen's Compensation Act constituting a bar to this action of Petitioner at common law. The District Judge ruled that the issue was one of law and granted the motion. Immediately thereafter the Respondent moved for a directed verdict and this particular affirmative defense was included as a grounds for the motion with the express permission of the Court. The District Judge took the erroneous

view that Respondent's construction work did not constitute a part of its trade and business because it did not perform such work by contract for third parties. He stated that in order to engage in the business it would be necessary to do that business for someone else. The Respondent's motion for a directed verdict was overruled and subsequent to the verdict of the jury in favor of the Plaintiff the Respondent moved for judgment non obstante veredicto in favor of the Defendant and in the alternative and reserving its position under such motion, then for a new trial. The District Judge denied both motions.

The issue here arose under the South Carolina Workmen's Compensation Law and must be determined by the provisions of that law. Under the terms of the Workmen's Compensation Act, where an owner undertakes work which is a part of his business, and contracts with another for the performance of that work, either in whole or in part, the owner is liable for the payment of compensation to any workman employed in the work to the same extent as if that workman had been immediately employed by him. (1952 *Code of Laws for* S. C., Section 72-111) The rights and remedies granted under the statute to an employee exclude all other rights and remedies of the employee as against his employer on account of injuries, and where an employee accepts an award under the statute, he is barred from proceeding further (Sections 72-121 and 72-123). The Court below concluded that the work performed by Bouligny under the contract was done in carrying on the trade or business of the Respondent and we submit that the evidence was susceptible of no other reasonable inference. It is obvious that the question presented did not raise an issue of fact for the jury but constituted a question of law for the Court. *Adams v. Davison-Paxon Co.*, (1957) supra. When Petitioner sustained his injuries he was working on facilities which were incorporated into and became a part of Respondent's business which was that of operating an electric distribution system. Try as he may, the Petitioner cannot get away from this fact. This was his work and the core of the whole matter is whether the work constituted a part of the Respondent's trade and busi-

ness and that it was, is plain and certain beyond any possible doubt.

The Petitioner states and repeats by innuendo and otherwise that the testimony of Respondent's Manager, Mr. A. J. Hurt, is unworthy of belief and seems to make this contention the basis of his claim to have the judgment of the Court below reversed. We submit that the testimony of Mr. Hurt is in the record for examination and Petitioner's attacks and charges are wholly without merit. His testimony was fully corroborated by Mr. E. V. McMahon, the Chief Engineer of the Southern Engineering Company, who supervised all construction work done by Respondent whether such work was done by its own employees or done by contract. The Petitioner offered no evidence to contradict Mr. Hurt's testimony or any part of it. When the District Court inquired of Petitioner's counsel if he had any testimony in reply, counsel answered that he did not know of any reply that was necessary and in spite of ample opportunity, Petitioner never proposed any testimony to contradict or rebut anything said by Mr. Hurt. Unfounded attacks and charges against a witness do not make an issue of fact or a question of law.'

Material facts in the case all point in the one direction, that Petitioner sustained his injuries while engaged in work which was part and parcel of Respondent's trade, business and occupation. The question of whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the Court. Under this principle and under Rule 50(b) it is clear that the Court below had the power to set aside the verdict in the District Court and order judgment for the Respondent upon the grounds that its motion for a directed verdict and subsequently for judgment non obstante veredicto should have been granted. The Seventh Amendment to the Constitution preserves the right to a jury trial according to the rules of the common law but certainly does not guarantee trial by jury of questions of law which are to be decided by the Court. The issue of whether Petitioner's claim at common law against Respondent was barred by the provisions of the South Carolina Workmen's

Compensation Act constituted purely a question of law for the Court and under the aforementioned Rule 50 of the Federal Rules of Civil Procedure, it is not to be disputed that the Court below had the power and the authority to reverse the judgment of the District Court with direction to enter judgement for the Defendant. *Brunet v. S. 'S. Kresge* (C.A. 7th) 1941, 115 F. 2d 713, Certiorari Denied, 61 S. Ct. 1102, 313 U.S. 577, 85 L. Ed. 1535; 28 U.S.C. 2106 and 28 U.S.C.A. 2106.

The Petitioner in the Court below contended that the District Judge was correct in concluding as a matter of law that the provisions of the South Carolina Workmen's Compensation Act did not constitute a bar to his action. Upon Petitioner's making his motion to strike this defense, the Court inquired of his counsel about his testimony in reply. There was ample opportunity afforded Petitioner to offer testimony if he had any and he was warned as to the prospect of Respondent's motion for a directed verdict. Simultaneously, the Court ruled that it was a question of law and there was no conflict in the testimony. In these circumstances, we submit that the Petitioner has not been deprived of any rights to a jury trial nor was he deprived of any of his rights in the trial according to the Federal Rules of Civil Procedure. We submit that the decision of the Court below is not only an appropriate judgement but is one that was required by both the evidence and the law.

ARGUMENT

I

The Evidence Establishes that Petitioner sustained the injuries of which he complains while engaged in work which constituted a part of Respondent's trade, business or occupation and his recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina.

The Petitioner got his case submitted to the jury in the District Court on the theory that Respondent could not divorce itself from part of its construction work, by having the same done by contract, for the reason that such work constituted such an essential and integral part of its business operations that it could not be separated; that for the safety of the contractor's employees, it was Respondent's duty to inspect their work as the same progressed, constantly and continuously and with its own employees; that it was Respondent's duty to post red danger signs at all points where the lines were energized during the construction period so that the contractor's employees would be aware of the hazard which they were creating for themselves.

Petitioner's position was and is that he was entitled to recover against Respondent under the common law, on the ground that Respondent was carrying on the construction work as a part of its business and its negligence in the conduct of such work was the proximate cause of his injury, and that he was not restricted to relief under the South Carolina Workmen's Compensation Law, because Respondent was not carrying on the construction work, in connection with which he sustained his injury, as a part of its business. We beg to repeat there what has often been quoted, "Oh, consistency, thou art a jewel!" It is impossible to reconcile the propositions contended for by Petitioner, namely, that Respondent was carrying on construction work, as a part of its business and that it was not carrying on construction, as a part of its business, at one and the same time. If Petitioner established by his proof that his injury resulted from Respondent's negligence in carrying on its con-

struction work, he necessarily established by such proof that his remedy was under the South Carolina Workmen's Compensation Law, not under the common law.

The Petitioner contends that the construction work, particularly of the substation he had climbed and the hot line he contacted, were completely foreign to and wholly divorced from Respondent's business, trade or occupation but in arguing negligence they contended a duty of performance on the part of Respondent in connection with the particular work being done. Petitioner contended that Ira Moss (Respondent's lineman assigned to this phase of the work to cut the energy off where requested) was there and should have observed the work that was done and was directed to see that the line was inspected (R. 8-11). Thus if Petitioner presented any evidence of negligence on the part of Respondent in regard to what it did or failed to do through its employees, at the subject time and place, it necessarily follows that such was directly involved with Respondent's participation under the construction contract in the work being done.

During the trial the District Judge ruled that only one question was left open after Petitioner's admissions, that being, "Whether claimant was injured while engaged in an operation which entered directly into and became a part of the business of the person for whom the work was being done?" (R. 20-22). *Doane, et al v. E. I. DuPont deNemours & Co.*, (C.A. 4th) 209 F. 2d 921. The most pertinent sections of the South Carolina Workmen's Compensation Act (1952 *Code of Laws,* Title 72) are set forth at the beginning of this brief under Statutory Provisions Involved. The admissions by Petitioner were that Respondent, Blue Ridge Rural Electric Cooperative, Inc., and the contractor, R. H. Bouligny, Inc., were duly filed and operating under the Act; that the Petitioner elected to receive and accepted full benefits provided by the compensation law and it was further admitted that Respondent did occupy the status of owner under the Act, provided the work being done when Petitioner's injury occurred constituted a part of the trade, business and occupation of Respondent. (R. 3,4).

It is well established that the leading case and recognized authority on this issue in South Carolina is *Marchbanks v. Duke Power Company, et al*, 190 S.C. 336, 2 S.E. 2d 825. In that case the South Carolina Supreme Court held that maintenance of the power lines and poles of the power company was an important part of its trade and business; and that the employee of a paint contractor engaged by the power company to paint its poles, and injured while so engaged, was in the trade business or occupation of the company; that the remedy of such employee was under the Workmen's Compensation Act and he could not maintain a common law action against the power company for the injuries sustained.

In *Kennerly, et al v. Ocmulgee Lumber Company, et al*, 206 S.C. 481, 34 S.E. 2d 792, the South Carolina Supreme Court cited *Marchbanks v. Duke Power Company, et al*, supra, with approval and quoted therefrom as follows:

> "'After all, we are governed by the Act of our own State. It behooves us then to consider it and determine what that Act means, and to that end we must determine the intent of the Legislature, as it is disclosed by the language used in the Act. It is our task to discover the sense in which the words were used when the section was passed. * * *
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> "'To us the plain interpretation of this language is that the lawmakers intended the term "owner" to be synonymous with the principal contractor, that is to say the party of the first part to the contract with the "subcontractor" who is the second party to the contract for the execution or performance of the work to be done by the owner. The primary purpose of a workmen's compensation act is to protect the workman who actually does the work. It is easily conceivable that a contractor or subcontractor other than the owner may let a part of the work to be done to others who are financially irresponsible and that the employee of such contractor or subcontractor who is injured while doing the work is left without remedy. *It is the clear purpose of the Act to make the "owner," the person who is interested in having the work done, liable to the employee so injured.*" (Emphasis ours)

The opinion of the then Circuit Judge (now Supreme Court Justice), Honorable G. Dewey Oxner, was reported in full in *Marchbanks v. Duke Power Company, et al*, supra, and from this opinion we quote the following:

> "The best reasoned case that I have found on this question is that of *State v. Benjamin F. Bennett Bldg. Co.*, 154 Md. 159, 140 A. 52, 53. It involves an act similar in principle to that of this State. The court, in referring to the section analogous to our Section 19, said:
>
> 'The effect of this provision, when brought into operation through the designated state of circumstances, is to impose the absolute liability of an employer upon the principal contractor when he was not in law the employer of the injured workman. The result, then, is that, where the prescribed conditions exist, the principal contractor becomes by the act the statutory employer of any workman employed in the execution of the work. * * *
>
> 'This primary liability so imposed by statute upon the principal contractor is not based upon contract, since the legislation is predicated upon the fact that no contractual relation, as master and servant, exists between the principal contractor and the workman; nor does it flow from a breach of duty, because the liability arises independently of the existence of fault on the part of the principal contractor. This legislation, however, finds its constitutional support in the consideration that the general welfare is promoted and conserved by requiring the employer and the workman to yield something of their respective rights toward the establishment of a principle and plan of compensation for their mutual protection and advantage. * * * The reasons for the enactment of this section of the act, and some of its advantages to the workmen, have already been noted in this opinion, and its corresponding special benefits to the principal contractor are that, with the imposition of a new statutory liability to a class of workmen who are not his servants, he is yet relieved of any liability at common law to any member of this class injured in the course of his employment within the act through the negligence of the principal contractor; and that, unless the

injury to the workman be through the principal contractor's neglect, the latter may recover against the subcontractor the compensation paid. If these beneficial provisions did not exist in favor of the employer, the section here under consideration might be difficult to support on constitutional grounds.'

"The Court then concluded: 'This theory would deprive a class of employers within the act of their exemption from all liability save that of compensation, which is an essential part of the general legislative plan. A construction so antagonistic to the fundamental principles underlying the enactment will not be adopted. If an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary.'"

The Petitioner relies upon the case of *Sears Roebuck & Co. v. Wallace*, (C. A. 4), 172 F. 2d 802, where a corporation engaged in the sale of merchandise contracted with a builder to make certain alterations in a storage warehouse. It was held that the alteration of the building was not a part of the business of the occupant and thus the occupant was not obliged to provide compensation for the employees of the subcontractor, but was a stranger to the latter's business. We do not think the *Sears & Roebuck* case could be considered analogous to the present case for the reason that under no circumstances could the Respondent be considered a stranger to the work being done under its contract with the Bouligny Company at the time of the injury to Petitioner. Also, Petitioner relies upon *Miles v. W. Virginia Pulp & Paper Co.*, 212 S.C. 424, 48 S.E. 2d 26 where the owner of a pulpwood plant engaged a contractor to supply him with pulpwood on a commission basis which we submit is not applicable here.

In construing a provision of the Virginia Workmen's Compensation Statute similar to the subject provision of the South Carolina statute, it was held in *Doane, et al v. E. I. DuPont deNemours & Co.*, supra, that the purpose of the Virginia statute is to limit the recovery of all persons engaged in the business under consideration to compensation under the Act and to deny any injured person the right of recovery against any

other person unless he be a stranger to the business. We think it was firmly established that the work being done in the present case at the time Petitioner sustained his injuries was part and parcel of Respondent's trade, business and occupation.

The following cases support the position of the Respondent: *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E. 2d 878; *Fox v. Fafnir Bearing Co.*, 107 Conn. 189, 139 A. 778; *Kennerly v. Ocmulgee Lumber Co.*, 206 S.C. 481, 34 S.E. 2d 792; *Continental Casualty Co. v. Haynie et al*, 182 Ga. 60, 186 S.E. 683; *Lee v. Claxton*, 70 Ga. App. 226, 28 S.E. 2d 87; *Sherlock v. Sherlock*, 112 Neb. 797, 201 N.W. 645; *Olsen v. Canter*, 93 Ind. App. 150, 176 N.E. 27; *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; *Isthmian S. S. Co. of Delaware, v. Olivieri, et al*, (CCA 5th) 202 F. 2d 492; *McDowell v. Stilley Plywood Co., et al*, 210 S.C. 173, 41 S.E. 2d 872; *Hopkins v. Darlington Veneer Co., et al* 208 S.C. 307, 38 S.E. 2d 4; *Purkable v. Greenland Oil Co.*, 122 K. 720, 253 Pac. 219; *Berry v. Atlantic Greyhound Lines, Inc.* (C. A. 4th) 114 F. 2d 255, 30 F. Supp. 188.

In *Smith, et al v. Fulmer, et al*, 198 S.C. 91, 15 S.E. 2d 681, the South Carolina Supreme Court stated:

> "It seems to us that the true test is: Was the employee doing something for the subcontractor which bore some reasonably direct relation to the performance 'of the work undertaken' by the contractor? The subcontractor, Sherard, simply stepped into the shoes of Fulmer with reference to the work of making the fills and laying the concrete paving. We think the admitted facts demonstrate that Smith, the deceased employee, was employed in the work which Sherard had agreed to perform for Fulmer, and hence under the terms of the statute Fulmer is liable just as if Smith had been immediately employed by him, for he was actually doing something which was essentially related to the fulfillment of the contract made by Fulmer with the State Highway Department."

A. The decision of the Court below that the work performed by the Bouligny Company under the contract was done in carrying on the trade or business of the Respondent was conclusively supported by the evidence.

We submit that the reversal by the Court below of the District Court's dismissal of the affirmative defense is not in conflict the decision in *Galloway v. U. S.*, 319 U.S. 372, 63 S.Ct. 1077, but on the contrary, if the decision is applicable, it sustains the position of Respondent. Also, the mention of the "scintilla" rule by Petitioner is not to be considered here.

The District Judge ruled that the issue was one of law and Petitioner did not disagree with this until the time of his Petition for rehearing in the Court below. In *Adams v. Davison-Paxon Company*, 230 S.C. 532, 96 S.E. 2d 566, in an opinion by Chief Justice Stukes, the South Carolina Supreme Court held,

> "It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the court, which includes the finding of the facts which relate to jurisdiction. *Knight v. Shepherd*, 191 S.C. 452, 4 S.E. 2d 906; *Tedars v. Savannah River Veneer Company*, 202 S.C. 363, 25 S.E. 2d 235, 147 A. L. R. 914; *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E. 2d 872; *Miles v. West Virginia Pulp & Paper Co.*, 212 S.C. 424, 48 S.E. 2d 26; *Watson v. Wannamaker & Wells, Inc.*, 212 S.C. 506, 48 S.E. 2d 477; *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E. 2d 718; *Holland v. Georgia Hardwood Lbr. Co.*, 214 S.C. 195, 51 S.E. 2d 744; *Younginer v. J. A. Jones Const. Co.*, 215 S.C. 135, 54 S.E. 2d 545; *Horton v. Baruch*, 217 S.C. 48, 59 S.E. 2d 545."

In the case at bar, at the close of all the testimony, the District Judge ordered Respondent's affirmative defense, that Petitioner's action was barred under the provisions of the South Carolina Workmen's Compensation law, stricken on the ground that Respondent is not a contractor, contracting to construct substations and the like for others (R. 48-52). Immediately fol-

lowing the ruling on the motion to strike, the Respondent moved for the direction of a verdict and included as one of the grounds, with the Court's permission, that Petitioner's action was barred by the South Carolina Workmen's Compensation law. Without discussing the motion, the Court overruled it, obviously overruling the defense here under consideration on the same ground that he had granted Petitioner's motion to strike. In passing on the motion to strike, the Court said:

> " . . . I am talking about the defendant in this case, it seems to me that the business they engage in is selling electricity. They are not in the contracting business. They don't go build substations for Gaffney, Newberry and somebody else, do they?" (R. 49). * *
> " . . . My idea of engaging in business is to do something for somebody else. What they are doing—and everything they do about repairing lines and building substations, they do it for themselves. To engage in the business is doing something for somebody else. How can you do business with yourself?" (R. 51).

The basis on which the Trial Judge granted Petitioner's motion to strike and on which he overruled Respondent's motion for the direction of the verdict is not made the test in any of the decisions. As a matter of fact, if such were made the test, all of the decisions touching the matter would have to be overruled.

The case of *Clarence Hudson v. Horry Electric Cooperative, Inc.*, is strikingly similar to the case at bar. This was an action brought in the Court of Common Pleas for Horry County, South Carolina and the decision is not reported. The decision was recorded on September 28, 1957 by Judge Gordon Badger Baker a distinguished South Carolina jurist, the son of Mr. Justice D. Gordon Baker, who served as Chief Justice of the South Carolina Supreme Court for many years. For the convenience of this honorable Court and if the Court desires to read this decision, the Referee's Report, the Court's Decree and the Order dismissing an appeal to the South Carolina Supreme Court are printed as an appendix to this brief. In this case the plaintiff was the employee of an independent contractor, which

contracted to construct 27.38 miles of new lines and 62 miles of conversion lines for the defendant, the cooperative, and the employee sustained personal injuries in connection with the work. The cooperative and the independent contractor were both covered by and operating under the provisions of the South Carolina Workmen's Compensation law when the accident occurred. The workman was paid compensation benefits for his injuries by the contractor under the South Carolina Workmen's Compensation law. He then brought an action against the cooperative alleging that his injuries resulted from its negligence. The cooperative answered, alleging that the injuries were sustained while he was engaged in the work which constituted a part of its trade and business and that his sole and only remedy against it was under the provisions of the South Carolina Workmen's Compensation law and that he had already been compensated under the said law for his injuries and that his action was accordingly barred. The cooperative was organized under "The Rural Electric Cooperative Act of South Carolina" in 1940. It took over 198.38 miles of lines serving 753 consumers, from the State Rural Electrification Authority and commenced operating. Immediately following its organization, it commenced and continuously carried on thereafter a construction program, doing part of the work with its own employees and part by special contracts. The contractor installed between 130 and 140 transformers along with its work and the cooperative installed about 600 in connection with its work. The workman was injured on a line while installing one of the transformers. At the end of 1956, the cooperative had 1590 miles of lines in its electric distribution system, serving 7,400 members. The Court held that the workman sustained his injuries while engaged in work which constituted a part of the cooperative's trade and business and that his exclusive remedy was under the South Carolina Workmen's Compensation law and that accordingly, his action was barred.

The facts in the evidence in this case lead to the inescapable conclusion that Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's trade and business. Under the provision of "The Rural Electric Co-

operative Act of South Carolina" (1952 Code of Laws for South Carolina, Chapter 15) Respondent is vested with the power among other things, to generate, accumulate and distribute electric energy in rural areas to its members and to construct, acquire, maintain and operate electric generating plants, buildings, and equipment and any and all kinds of property which may be necessary and convenient to accomplish the purposes for which it was organized. During the period of its existence, Respondent has exercised the powers given it under the Act.

The Record discloses that within the short space of 15 years, Respondent with its own employees and by special contracts, let from time to time, constructed a total of approximately 1700 miles of lines and appurtenant facilities to serve approximately 9,700 consumers. In addition and at the same time, it carried on all of the maintenance, conversion and rehabilitation work required in its system.

Materials and facilities used in an electric distribution system are rather short-lived and especially so if the system is experiencing rapid growth. For example, although Respondent had been operating only about 12 years when the Bouligny contract was let, nevertheless, that contract called for the conversion, re-phasing and rehabilitation of 87.7 miles of existing lines, 2 appurtenant substations, a breaker station and only 24.2 miles of new transmission and distribution lines. Within the period, it built 3 substations, which had either been rebuilt or had been abandoned at the time of the trial. Thus, the Record discloses that Respondent's electric distribution system, construction, maintenance, conversion, rephasing, rehabilitation and other like work, is a continuous operation. Each facility, constituting a part of the system, is indispensable to its operation, the substations, the transformers and all other like facilities. With its own employees, it has carried on every type of construction involved in building its distribution system and called for under the Bouligny contract.

With respect to the evidence in the case, Petitioner argues that facts, which are found in it, should be treated as not being in it, because he thinks it is possible to give two interpretations to part of them. He argues that all evidence touching an issue

should be disregarded if some part of it is capable of two interpretations, even by forced inference. He argues that testimony of witnesses should be disregarded, if other witnesses could have been produced but were not, who could have testified as to the same facts, or to some part of them. He would substitute inference for proven fact and would have speculation overriding positive proof. He seeks to rely upon forced and violent inference from the evidence, not upon the facts as they appear in it. He would withdraw evidence from the Record rather than construe it as found therein. He would substitute prejudice for fact, innuendo for proof. The attack upon a witness is one thing; its justification, quite another. The authorities, cited for his propositions, do not support them. He argues that the frequency with which Respondent constructs a particular type facility in its system and its technical character determine whether its construction constitutes a part of its business. Transformers are installed in the system by hundreds, substations by ones and twos. Each of the designated facilities is indispensable in operating its system. Each has to do directly with the transmission of electric energy to its members. He would argue that the installation of the transformers, except perhaps the very largest ones, would constitute a part of its business, but that the installation of the very largest transformers and the construction of substations would not constitute a part of its business. There is no authority in the decisions for such propositions. Such rule, if one there were, would not only be illogical, but would be impossible of definition and of application.

If the forced and violent inference from the facts of the evidence, contended for by Petitioner, were allowed, the fact would still remain that substations constitute a vital and integral part of the Respondent's electric distribution system and that their construction constitutes a necessary and essential part of its business. Whether Respondent, if its own employees constructed only 3 substations and, whether they were in use at the time of the trial in District Court is of no consequence as to the issue here involved, in the light of all of the other evidence in the case. If Respondent had never constructed a sub-

station with its own employees, it would still follow under the facts of the case, that the construction of its substations constituted a part of its business.

Boseman v. Pacific Mills, supra, involved the deaths of two employees of an independent contractor who had contracted to paint the water tank of a textile mill. Although the mill always contracted for this specialized work and never did it by its own employees, the South Carolina Court held that the work was an integral part of the business of the mill and that the dependents of the deceased workmen were entitled to payment by the mill of Workmen's Compensation benefits. It is to be noted that the employees of the independent contractor were doing work on a stand-by facility, not on a facility involved in the manufacturing work of the plant. The manufacturing processes could have gone on without the facility which was required only to protect the processing equipment against fire.

The facts in the case at bar present a much stronger case. Here, Respondent serves its consumers electric energy through the substation which was under construction. The substation is not a stand-by facility to protect the system against an emergency and contingency. If a substation were a non-electric, unrelated facility, it would be of no comfort to Petitioner under the facts of the present case. He was not injured by the substation. It was not energized. The substation was merely serving as a platform or support for Petitioner when he was injured by reaching to an energized line outside the substation. The contractor was constructing the line. It had been fastened to insulators on the outside of the substation and this line was not completed until it was connected inside of the substation. That is what the Petitioner was attempting to do at the time of his injury, i. e., he was measuring a piece of line in order to make the connection from the line connected to the insulators on the outside of the substation to a point on the inside of the substation. The hot line contacted by the Petitioner had been newly constructed for Respondent by the Bouligny Company under the same contract that included construction of the substation. It is apparent that Petitioner would have received the same injury if he had climbed a pole to reach the

wire. In either event and however the facts of the accident may be viewed, the work being done was an integral part of the trade, business and occupation of the Respondent.

B. The testimony of A. J. Hurt and E. V. McMahon.

In his brief the Petitioner asserts, re-asserts, repeats, charges and re-charges, by innuendo and otherwise, that the testimony of Respondent's manager, A. J. Hurt, is unworthy of belief. That is made the basis of his claim to have the judgment of the Court of Appeals reversed. If making and repeating a charge could prove it, Petitioner would accomplish his purpose. Fortunately for the attacked witness, the Record in the case is before the Court and we welcome and invite an examination of it for the facts. It will be found that the vicious attack upon him is wholly unwarranted and that it is most unjust. This is what the record shows:: On March 11, 1955 prior to the trial in the District Court Mr. Hurt's deposition was taken by Petitioners' counsel at Anderson, South Carolina. Later, the same counsel again took his deposition at Pickens, South Carolina. The witness was asked over and again what precautions he or the Respondent took for the safety of the employees of the contractor working on the project on which Petitioner was injured. Respondent's counsel concluded that the witness was being harassed by vexatious repetitions and instructed the witness not to answer. The Petitioner's counsel threatened to petition the Court for an order requiring the witness to answer but no such petition was ever made to the Court. On the trial of the case while Petitioner's testimony was being presented, portions of Mr. Hurt's deposition were offered in evidence including the colloquy with respect to the foregoing. Mr. Hurt was then called to the stand and the same question was put to him and he answered promptly and properly (R. 17). From what was said in connection with the reading of the deposition, the District Judge apparently gathered the impression that the witness refused to answer a question of his own accord and without cause and thereupon he took precipitant and impulsive action against the witness which we think was unjustified (R. 17-18). The witness answered "Mr. Edens, the contract

speaks for itself," and we submit that this answer was responsive to the question which was asked him. It was a truthful, honest and proper answer.

The contract between Respondent and the Bouligny Company spelled out in great detail the precaution required by Respondent to be taken for the safety of the workers. It provided that the contractor should employ on the project competent, experienced and reliable foremen, such skilled workmen as should be necessary for the various classes of work to be performed and a competent superintendent who should be present at all times during working hours where construction was being carried out; that the contractor should not at any time or under any circumstances cause or permit any of its employees to perform any work upon energized lines, or upon poles carrying energized lines; that the contractor should at all times take all reasonable precautions for the safety of its employees on the work and of the public; that it should comply with all applicable provisions of Federal, State and municipal safety laws and building and construction codes; that all of its machinery and equipment and other physical hazards should be guarded in accordance with the "Manual of Accident Prevention in Construction" of the Associated General Contractors of America; and that sufficient, safe, cool drinking water and an adequate first aid kit should be provided on each of its work trucks and that adequate safe equipment and construction tools should be provided for its workmen.

Naturally, Mr. Hurt could not enumerate from memory the requirements set out in the contract for the safety of the contractor's employees. Therefore, he gave the best answer he knew by suggesting a reference to the contract itself for its terms. The Petitioner made the same attack on the witness in the Court below that is made here. Exception was taken to the trial Court's action in threatening to adjudge the witness in contempt but, since the Court below ordered entry of judgment for Respondent on the basis of its legal defense, it did not become necessary for the Court below to pass on the exception.

and voluminous. Before the trial he read it and was familiar with it. His counsel suggested that he read it and he did so. There was certainly nothing wrong about this. On cross-examination counsel continuously asked him confusing questions as to what he knew under the contract then, as compared to what he did not know about it and in connection with it on deposition. What he knew about the contract on trial and failed to know about it on deposition has no bearing on the issue here as to whether Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's business.

When Petitioner's questions are examined in the light of the Record and of the basic issue involved, they are found to be wholly without merit. Unfounded attacks and charges do not make an issue of fact or a question of law. Further, the U. S. Constitution does not guarantee trial by jury of questions of law which are to be decided by the Court and only questions of fact are to be decided by a jury. In *United States v. Standard Oil Company of Indiana, et al* (Ex parte United States), 101 F. 2d 870 at page 878 the Court said:

> "In the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks. Ex parte Peterson, 253 U. S. 300, 312, 313, 40 S. Ct. 543, 64 L.Ed. 919; Funk v. U. S., 290 U. S. 371, 381-384, 54 S. Ct. 212, 78 L. Ed. 369, 93 A.L.R. 1136. As we have already seen, the constitutional guaranty does not in this case stand in the way of doing after trial what could have been done at the trial. There has been no encroachment on the proper province of the jury. The essence of legal power is to take the case away from the jury, where there is an insufficiency of evidence to sustain a conviction. The power to direct a verdict and the power to render a judgment of dismissal pursuant to the reservation of the legal question are clearly incidental to, and necessarily flow from, the judicial function of determining the legal sufficiency of the evidence."

While the Seventh Amendment to the Constitution pre-

serves the right to a jury trial according to the rules of the common law, it is well established and fundamental that, although questions of fact must be decided by the jury and may not be re-examined by the Court, the question whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law to be decided by the Court. In the Federal Rules of Civil Procedure under Rule 50 there is provided a procedure for the determination of this question of law by the Federal Courts. Rule 50 (a) provides for a motion for a directed verdict at the close of the evidence, before the case is submitted to the jury. It enables the Court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law. Rule 50 (b) authorizes the Court to reserve the decision of this question of law until after the case has been submitted to the jury. If the Court decides that a verdict should have been directed, it may set aside the verdict of the jury and enter a judgment notwithstanding the verdict. Rule 50 (b) also authorizes a motion for a new trial in the alternative. It is well established that the sufficiency of the evidence is not reviewable on appeal unless a motion for directed verdict was made in the trial Court as was done in the present case with the subsequent motion for judgment notwithstanding the verdict being made in due time. We respectfully submit that if an appellant unsuccessfully moves for a directed verdict and for a judgment notwithstanding the verdict in the trial Court, the Court of Appeals, in reversing the judgment, has unquestioned power to order the entry of judgment non obstante veredicto. In *Brunet v. S. S. Kresge Co.*, C.C.A. 7th, 1941, 115 F. 2d 713, certiorari denied 61 S. Ct. 1102, 313 U. S. 577, 85 L. Ed. 1535, where reviewing court vacated judgment for plaintiff on ground of insufficiency of evidence, action of court in reversing and remanding with directions to dismiss on the merits, without remanding for a new trial, did not deny plaintiff the constitutional right to trial by jury, where, within ten days after reception of verdict for plaintiff, defendant filed motions, one to set aside the verdict and for a new trial, and the other

to set aside the verdict and enter judgment notwithstanding the verdict, and both were denied and judgment entered on the verdict, since, by such action defendant reserved its right under subdivision (b) of this rule relating to reservation of a decision on a motion for a directed verdict so that it was entitled to direction of judgment without a new trial.

In *Lowden v. Denton*, C.C.A. Mo. 1940, 110 F. 2d 274, certiorari denied, 60 S. Ct. 1100, 310 U.S. 652, 84 L. Ed. 1417, it was held that a railroad was entitled to direction for judgment of dismissal on the merits when Circuit Court of Appeals reversed judgment against railroad on ground of absence of evidence of negligence, notwithstanding motion for directed verdict was denied without reservation, since under this rule trial court was deemed to have submitted the action to jury subject to a later determination of legal questions raised by motion for directed verdict, and hence express reservation was unnecessary.

Also, in *Home Life Insurance Co. of New York v. Moon*, C.C.A. W. Va. 1940, 110 F. 2d 184, certiorari denied 61 S. Ct. 15, 311 U.S. 659, 85 L. Ed. 422, rehearing denied 61 S. Ct. 129, 311 U.S. 726, 85 L. Ed. 473, and 61 S. Ct. 173, 311 U.S. 728, 85 L. Ed. 474, rehearing denied, 62 S. Ct. 298, 86 L. Ed. 568, it was held that under Rule 50 (b) when Circuit Court of Appeals believed that the evidence justified only one reasonable inference, that insured's death was due to suicide, and defendant had moved for a directed verdict and for judgment notwithstanding the verdict, court should remand actions for double indemnity under life policies and on accident policy, with directions to set aside judgments for beneficiary and to enter judgment for insurer.

Petitioner asserts that the witness sought to create the impression on direct examination that Respondent constructed three substations with its own employees, which were in use at the time of the trial. Here is what the witness testified with respect to the matter (R. 31):

> "Q. Does the Cooperative construct substations with its own employees?
> "A. Yes, sir, we have constructed substations.
> "Q. Have any been constructed by its own employees similar to the one near Walhalla that has been under discussion in this case.
> "A. Yes, sir, we have built substations of that nature.
> "Q. Do you recall how many substations the Cooperative has built with its own employees?
> "A. Yes, sir, we built three."

On cross-examination, when the witness was asked to identify the substations which Respondent built with its own employees, he did so without the slightest hesitation. Every question put to him was answered promptly, courteously, and to the best of his ability. No witness can do more.

When Mr. Hurt's deposition was taken he had not read the contract between Respondent and R. H. Bouligny, Inc. and accordingly was not familiar with its terms. Before the trial of the case in District Court, he read the contract and acquainted himself with its provisions. He is criticized for this. On cross-examination he was asked questions about what he had said on deposition when he was not familiar with the contract. Certainly these questions could have been confusing to the witness but at all times his answers were truthful and forthright, courteous and direct. He did not go into the field and familiarize himself with the details of work done under the contract. He is criticized for that although his work as manager was an administrative position. It was not his duty to check on the contractor's work as that was the duty of Southern Engineering Company. Mr. Hurt did not personally investigate Petitioner's accident and report it to the South Carolina Industrial Commission. He is critized for this. Petitioner was working under

the contractor and his accident was reported to the South Carolina Industrial Commission and he received compensation in the maximum amount allowed by law.

The Petitioner offered no evidence to contradict Mr. Hurt's testimony or any part of it. When the District Judge queried his counsel about testimony in reply, counsel stated that he knew of no evidence (R. 48).

Mr. Hurt's testimony was fully corroborated by E. V. McMahon, the Chief Engineer of Southern Engineering Company, who supervised all construction work done by Respondent whether done by its own employees or done by contract. There can be no doubt from his testimony that the Respondent performed all the types of construction work that were done under the Bouligny contract. He mentioned that the construction superintendent for Respondent drew the specifications for the double circuit distribution system leading out of the Pickens substation, which was constructed under this same contract with Bouligny. The Petitioner would contend that most of the construction work performed by Respondent was related to the construction of new lines. Surely most of the construction work required would be for new lines and the appurtenances incidental thereto. Mr. McMahon's testimony is firm and clear that the work being done including the construction of the Walhalla substation and the line connecting thereto which Petitioner contacted was all a part of the trade and business of the Respondent and such work including the engineering was done under his supervision.

C. The construction contract by the Respondent and R. H. Bouligny, Inc., Defendant's Exhibit "C"

In this case all the work being done by the Bouligny Company was under the one contract which covered new lines, conversion of lines and substations. These things are integrated and cannot be separated into different catagories as far as the trade and business of the Respondent may be concerned. Two types of line construction were provided for under the contract: one was the construction of new lines; the other was the re-working of lines which were in use serving Respondent's con-

sumers and referred to in the contract as conversion. According to the uncontradicted testimony of the witness McMahon, the wire contacted by Petitioner was a part of the Ebenezer line and was covered by the portion of the contract calling for conversion. If this construction work performed under the contract could not be carried on for Respondent without its active participation therein, it must follow that such construction work constituted a part of Respondent's business, trade and occupation. According to the terms and provisions of the contract, the Respondent was the owner and the Bouligny Company was the contractor. The Record establishes that Respondent was the owner of the land upon which the substation was being constructed and furnished the materials to the contractor to be assembled together for the substation.

It would appear from Petitioner's brief that he would now attempt to question for the first time whether Respondent was the "owner" in these circumstances and as would be required for the South Carolina Workmen's Compensation law to apply. It is clear from the Record and particularly the conference before the District Judge immediately preceding the trial that all issues were stipulated with regard to the position of Respondent under the Workmen's Compensation Act and as agreed before the Court, the only question was "In the meaning of the Workmen's Compensation Act, was the Plaintiff the employee of Blue Ridge Electric" (R. 4). *Kennerly, et al v. Ocmulgee Lumber Co., et al,* 206 S. C. 481, 34 S. E. 2d 792.

It is obvious that the main actor in the whole enterprise was the cooperative, the Respondent herein. This is seen clearly when we view the whole picture of what was done in the formation and performance of the Bouligny contract. The project was begun when Respondent secured a loan of $334,300.00 from the United States Government under the Rural Electrification Act of 1934, as amended, to finance certain construction work. The lines to be constructed were to be located along such routes as the owner with the approval of the administrator should designate. Then Respondent entered into an engineering service contract with the Southern Engineering Company, whereby the engineer agreed to render the engineer-

ing services necessary for the design and construction of the project. This contract provided for the preparation of plans and specifications by the engineer, the approval thereof by the owner, the selection of a contractor by competitive bidding, the staking of the project by the engineers after the procuring of the rights-of-way and easements by the owner, and the supervision by the engineer of all the details of the construction work as the representative of the owner. This was pointed out by the Court below with the fact that the construction contract with the Bouligny Company conformed to the requirements of the loan agreement. All of this is succinctly stated in the opinion of the Court below as follows:

> "It (the contract) defined the Engineer as one employed by the owner with the approval of the Administrator to supervise the construction of the project; it authorized the owner, acting through the Engineer with the approval of the Administrator from time to time to make changes in the plans and specifications; it subjected the manner of construction and all materials and equipment used therein, to the inspection and approval of the Engineer, and it required the contractor to maintain an office for the Engineer on the site to facilitate the work of supervision. The contractor agreed to furnish the materials according to the specifications at agreed prices; but the contract showed that the materials of which the sub-stations were to be constructed were purchased by the Cooperative. The Cooperative assumed the responsibility and agreed to perform the service of de-energizing and re-energizing existing lines during the progress of the work."

The Petitioner relies upon the case of *Ballard v. Southern Cotton Oil Co.* (D.C. S.C.) 145 Fed. Sup. 882, by now contending that even if the work in which he was engaged when he was injured was a part of the trade or business of Respondent, he is not precluded in the present action because the Bouligny Company paid the compensation award and hence the acceptance of the award does not bar his suit under the provisions of Section 72-123 of the Workmen's Compensation statute. The

Court below recognized that the point was being raised for the first time in that Court because in the District Court the Petitioner conceded that he had no case if the work being done was a part of the trade or business of the Respondent. Although the point was raised for the first time on the appeal, it was considered by the Court below which held that the contention could not be sustained. *State v. Bennett Building Co.*, supra. The Court below concluded it was impossible to follow this decision by District Judge Timmerman since it was apparent that the decision was in direct conflict with the decision of the Supreme Court of South Carolina in *Marchbanks v. Duke Power Co.*, supra. We further submit that the decision is clearly contrary to the South Carolina law declared in the case of *Adams v. Davidson-Paxon Co.*, supra.

In holding that this contention of the Petitioner could not be sustained, the Court below said:

> "It involves the erroneous assumption that although the statute imposes the absolute liability upon the owner of the business to provide compensation, usually effected by carrying insurance for the employees of the individual contractor, the owner loses the off-setting benefit of immunity from suit at law provided by the statute, if the injured workman elects to receive compensation from the contractor. It is generally held under statutes of this kind that both the owner of the business and his individual contractor or the princi-al contractor and his sub-contractor, where they are parties concerned, are exempt from suit."

D. The Statute under which the Respondent was organized and operating.

The Respondent was incorporated pursuant to a special statute of the South Carolina Legislature. (1952 Code of Laws for S. C., Chapter 15, Rural Electric Cooperative Act) and Section 12-1025 (5) (8) (10) (11) (See Statutory Provisions Involved) expressly provides for Respondent to undertake and perform the exact type of work that was being done when Petitioner received his injury. Under the subject contract the Bouligny Company was constructing and converting lines and

building appurtenant substations and such work falls directly under the powers of the Appellant as described in the statute. The making of the contract and the performance of the work thereunder constitutes substantial evidence that Respondent was exercising the powers which it was expressly authorized by statute to perform.

The Petitioner cites the case of *Benbow v. Edmunds High School*, 220 S.C. 363, 67 S.E. 2d 680 which we submit is not applicable. In this case the South Carolina Supreme Court held that the workman was not covered under Section 72-111 while engaged in minor electrical repairs in a school building upon the ground that he was a casual employee. In the last paragraph of the opinion, the Court states: "The foregoing conclusion renders it unnecessary for us to determine whether the work being performed by Rhame was a part of the 'trade, business or occupation' of the Edmunds High School."

In 1936 the United States Congress passed an Act creating the National Rural Electrification Administration and authorizing the Administrator thereof, from funds appropriated under the Act, to make loans for rural electrification to Rural Electric Cooperatives "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas" who were not receiving central station service.

As of December 31, 1956, the Administrator had approved distribution system construction loans under the act amounting to $2,647,764,122 to finance an estimated 1,446,484 miles of line and other facilities to serve an estimated 4,793,990 farms and other rural establishments. "1956 Annual Statistical Report U. S. Department of Agriculture, Rural Electrification Administration" of which the Court will take judicial notice. *Tolfree v. Wetzler*, (C.A. 3rd.) 22 Fed. 2d 214.

It would, we submit, be a legal anomaly for the Courts to hold that, although the rural electric cooperatives have carried on and are carrying on this mammoth construction program, nevertheless, the construction does not constitute part of their business operations. With an electric distribution system, con-

struction, maintenance, reconstruction and operation and service are so intertwined and interwoven that the two are inseparable. Construction is as essential to its operation as is the current which it transmits. Construction cannot be divorced from its operation. Without continuous construction, it cannot operate.

The Petitioner was injured while on a substation which Respondent was constructing by contract. The fact that he sustained his injury while on a sub-station, he argues, serves to give rise to relief for him under the common law, in addition to his remedy previously exercised under the provisions of the Workmen's Compensation Act. In effect, he argues that a substation is not an integral part of an electrical distribution system; that it is a sort of unrelated facility and its construction does not constitute part of the construction of the system. Nothing could be further from the fact. An electrical distribution system can no more operate without sub-stations than it can without transformers, lines, poles, cross-arms, insulators, anchor wires, meters and other essentials. With a growing system the stations must undergo frequent change, enlargement and/or replacement, so that larger and heavier power loads may be handled. The construction and the growth of Respondent's system has been steady and continuous and it has been pursued by the Respondent exercising the powers and engaging in the business which it was authorized by statute to perform.

II

The question of whether Petitioner's injuries were sustained while he was engaged in work which constituted a part of Respondent's business, trade and occupation constituted a question of law for the Court and not an issue of fact for the jury.

In the Court below it was conceded by Petitioner that both Respondent (the owner) and Bouligny (the contractor) had complied with and were operating under the Workmen's Compensation Act; that after Petitioner's injuries were sustained, he had elected to receive and had accepted full compensation

benefits under said Act from Bouligny; it was also conceded that if the work being done at the time of Petitioner's injury constituted a part of the business of the Respondent, the present suit must fail. The case proceeded to trial with the Petitoner having admitted into the Record all requirements of this legal defense except one; to wit: that the work being done by the contractor constituted a part of the trade, business and occupation of the Respondent or stated otherwise, in the meaning of the Workmen's Compensation Act, was the Petitioner the employee of the Respondent. The Respondent moved for a directed verdict or involuntary dismissal at the close of Petitioner's testimony and at that time, the District Judge ruled that only one queston was left open after Petitioner's admissions, that being "Whether claimant was injured while engaged in an operation which entered directly into and became a part of the business for whom the work was being done?" *Doane, et al v. E. I. DuPont deNemours & Co.*, supra.

The issue presented here arises under the provisions of the South Carolina Workmen's Compensation law, a special statute which divests the jury of its normal function in connection with questions arising thereunder and was clearly a question of law for the Court. In the recently decided case of *Adams v. Davison-Paxon Company,* (1957), supra, the South Carolina Supreme Court specifically held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the Court, which includes the finding of the facts which relate to jurisdiction. The opinion stated:

> "Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether Emporium was performing a part of the 'trade, business or occupation' of the department store-appellant and, therefore, whether respondent's remedy is exclusively under the Workmen's Compensation Law. This was included in appellant's grounds for directed verdict; upon consideration of the evidence we are constrained to hold that it was error to refuse the motion to direct the verdict in favor of appellant."

Also, the opinion further stated:

> "In the case in hand it appears that appellant and Emporium operated within the coverage of the compensation law; but that of Emporium must have been voluntary because they had only three employees in appellant's store. Secs. 72-107(2) and 72-109. Except for this voluntary assumption by Emporium of liability under the act and except for the effect of Sec. 72-111, plaintiff would be without the protection of workmen's compensation. For it she gave up the right to proceed at common law in an action for damages. As has been said by many courts in many decisions, if an employer is within the act to bear its liabilities, he must remain to be accorded its immunities, in the absence of a clearly expressed legislative intention to the contrary. In the instant case, and in others similar, appellant is entitled to workmen's compensation without burden upon her to prove actionable negligence on the part of the owner or its contractor, and is immune from the usual defenses in employee against employer actions at law.
>
> "We are not called upon in this appeal to decide whether she should proceed against Emporium or both, for the compensation benefits to which the facts appear to entitle her. Here we only decide that she is not entitled to maintain this action at law. Sec. 72-121 so limits her remedy."

While it is obvious that the question presented did not raise an issue of fact for the jury but constituted a question of law for the Court, we submit that the material facts in the case all point in one direction and lead to the inescapable conclusion that Petitioner, when he sustained the injury complained of, was engaged in work which constituted a part of Respondent's trade, business and occupation. The evidence in the case is susceptible of no other reasonable inference than that the construction of the substation, on which Petitioner was standing, and the wire to which he reached and touched in the course of his work when his injuries were sustained, were essential to the successful and proper operation of Respondent's electric distribution system; that the facilities

when completed, became an essential and integral part of its operating system and that accordingly, when Petitioner sustained his injuries, he was engaged in work which was essential and entered directly into and became a part of the business of the person for whom the work was being done. The evidence has not been and cannot be disputed that Respondent, with its own employees, continuously and by special contracts, from time to time, has carried on construction work on its own operating distribution system; that construction work on the system in its various aspects and types goes hand in hand with the distribution and sale of its product, electric energy, each being essential and complementary to the other in the operation of its system. The evidence is susceptible of no other reasonable inference that Respondent's employees constructed substations, although, as has already been pointed out, it is of no consequence whether they constructed three or some other number or none, so far as the issue here is concerned.

In his Petition for Writ of Certiorari and twice in his brief on the merits, the Petitioner has listed seven items which he contends constitute questions for a jury. We list these items here with our comment following each.

Q. 1. "That Respondent had six substations".

Comment: Certainly, there are no inferences to be drawn from this on the issue in question. Whether it had six, more or less than six, could have no bearing on the question involved.

Q. 2. "That on direct and cross-examination Respondent's manager, A. J. Hurt, testified that three of the substations were constructed by Respondent's own facilities and employees, the last of which was constructed at Liberty, South Carolina, three years prior to Petitioner's injuries".

Comment: On direct examination Mr. Hurt testified that Respondent's employees constructed three substations. He did not testify that they constructed three of the six then in use. On cross examination, when asked to name the substations they constructed, he testified that they built the original ones at Liberty, Tigerville and Westminster. He did not testify that

the last of the three was built at Liberty, South Carolina, three years before. He testified that a station was built at Liberty three years earlier. If the witness had said what Petitioner contends for, which he certainly did not, no inferences could have been drawn from the statements material to the issue as to whether Petitioner was engaged in work at the time of his injuries which constituted a part of Respondent's business.

Q. 3. "That on being recalled to the stand for recross-examination the following day, Mr. Hurt stated that Respondent did not use its own facilities and employees to construct its substation at Liberty, South Carolina, three years prior to Petitioner's injuries, but that the work was done by the independent contracting construction firm engaged in business of constructing substations".

Comment: The witness had never testified that the substation, then in use at Liberty, was constructed other than by contract. He had not testified by whom it was constructed. Furthermore, inferences as to how and when the last substation was constructed at Liberty, are not material as to whether Petitioner sustained his injuries while engaged in work which constituted a part of Respondent's business.

Q. 4. "That Mr. Hurt finally testified that the Respondent did not use its facilities or employees to build any of its six substations".

Comment: As above pointed out, Mr. Hurt never did testify that Respondent's employees built any of the substations in use at the time of the trial. Furthermore, whether the substations constructed by Respondent's employees were or were not in use at the time of the trial is not material to the issue here involved.

Q. 5. "That Mr. Hurt's testimony was evasive as to the number of substations Respondent operated".

Comment: "When asked to do so, the witness identified every substation Respondent had by giving its location. What more could he have done? There was nothing evasive about this. Furthermore, the numer of substations Respondent had

at the time of the trial has no bearing on the basic issue here involved.

Q. 6. "That he refused to answer a material question propounded by Petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might directly subject the witness to contempt of Court".

Comment: The only time the witness failed to answer was on deposition, when the same question had already been put and answered numerous times and counsel instructed him not to answer the question. The record will show that he did not refuse to answer any question in Court. The first question put to him was answered promptly and properly. Upon his answering the very first question asked, the Court threatened him with contempt proceedings because of the answer given. How can it be said "that he refused to answer a material question propounded by Petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might directly subject the witness to contempt of Court", when his prompt answer to the very first question asked was the one in connection with which the Court threatened the contempt action? The Court's shocking action came when he first took the stand and when he answered the first question asked. In the light of the Record in the case, which is plain and clear, the statement in item 6 is quite surprising. Furthermore, what action the Court threatened to take against the witness has no bearing on the basic issue here involved.

Q. 7. "That Mr. Hurt's testimony on deposition taken before trial was in direct conflict with the knowledge he professed to have about material facts to which he testified at the trial".

Comment: If the witness testified one thing on deposition and the opposite on trial, the testimony could be pointed out. This is not done, because it cannot be done. On deposition, the witness had not read the contract between Respondent and Bouligny which inspection will reveal to be extensive

between the plaintiff and the defendant. Let no other costs be taxed.

s/ G. BADGER BAKER
Judge of the Twelfth Judicial Circuit

At Chambers
Florence, S. C.
September 28, 1957.

CLARENCE HUDSON, PLAINTIFF

versus

HORRY ELECTRIC COOPERATION, INC., DEFENDANT.

ORDER DISMISSING APPEAL

Upon consideration of the Notice of Motion to Dismiss Appeal in this matter returnable before me this day, and upon consideration of the affidavit, certificate, and the record in the cause, it appears that the plaintiff-appellant has failed to perfect his appeal in accordance with the requirements of law. See *Wade v. Gore*, 154 S.C. 262, 151 S.E. 470. It is, therefore, on motion of Burrough and Green and Williams and Henry, attorneys for defendant.

ORDERED that the appeal of the plaintiff to the Supreme Court of South Carolina be, and the same hereby is, dismissed for failure to perfect same.

s/ G. BADGER BAKER,
Judge of the Twelfth Judicial Circuit

At Chambers
Florence, S. C.
November 23, 1957.

III

The Petitioner, whose motion in the District Court to strike an affirmative defense was granted and who was simultaneously offered an opportunity to present reply testimony on the same defense upon which the Respondent based a motion for a directed verdict which was overruled, does not have the right to a new trial upon the ground that Appellate Court did not have the power to reverse the rulings of the District Judge with direction to enter judgment for the defendant.

At the close of Respondent's testimony in the District Court, the Petitioner moved to strike Respondent's affirmative defense that this action was barred under the provisions of the South Carolina Workmen's Compensation law. The Court immediately asked Petitioner's counsel if he contemplated offering any testimony in reply if the motion was overruled (R. 48). The Petitioner's counsel stated that he did not know of any reply that was necessary and he did not suggest that at any time that Petitioner had any reply testimony to offer. The Court advised prior to ruling on the motion that Respondent's counsel would likely move for a directed verdict on the same ground since the issue was a question of law (R. 49). The District Judge granted the motion to strike and then upon Respondent making its motion for a directed verdict, he allowed Respondent to include as a ground for its motion the defense which had just been stricken. Thus, the Petitioner contends that his action in the District Court in moving to strike this affirmative defense at the conclusion of Respondent's testimony and in failing to offer reply testimony thereto, divested the Court of Appeals of the power to reverse the judgment of the District Court and to direct entry of judgment for Respondent on the legal defense that had been alleged and established in bar of Petitioner's action. There is no question that Petitioner had full opportunity and occasion in the District Court to offer reply testimony to the Respondent's case on this or any other issue. He stated that he did not know of any reply that was necessary when directly asked by the

Court if he would offer any testimony and he remained silent when the Court expressly allowed Respondent to reserve its rights and to include this same defense in its grounds for a directed verdict. We have previously pointed out in this brief that in the Court below the Petitioner contended that the trial Judge was correct in withdrawing the issue of the application of the Workmen's Compensation Act as a bar to Petitioner's action upon the grounds that it was a matter of law. The Petitioner now argues that the granting of his motion to strike should have been affirmed by the Court below but, on the other hand, he argues that the facts on which the issue was decided were for the jury or at least he should be given the opportunity to try the case again and attempt to make an issue for the jury. The very issue upon which Petitioner now claims he is entitled to a determination by jury was removed from the jury in the District Court upon his own motion and he made the claim of the right for the first time in his Petition for Rehearing in the Court below.

In the District Court, as pointed out in discussion in our Question I, the District Judge overruled Respondent's motion for direction of a verdict on an erroneous concept of the applicable law. There was no invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution in the action of the Court below and the procedure was consistent with applicable Federal procedure. If a litigant in the District Court could elect to withhold evidence when opportunity is afforded to offer it and could secure a new trial on the basis of the election, the trial Court would become a testing ground for the wits of counsel and not a tribunal for the administration of justice. The opinion in *Bryan v. United States*, 70 S. Ct. 317, 338 U. S. 552, stated that when the Judicial Code was revised in 1948, the provisions of Sections 876 and 877 relating to the power of the United States Supreme Court and that of the Court of Appeals on remand were dovetailed into a single section, 28 U.S.C. 2106 and 28 U.S.C.A. 2106. (See Constitutional and statutory provisions involved). Under this statute for the first time the power of the Supreme Court and the Courts of Appeals to enter judgment

when remanding a case to the lower Court is set out in identical language in a single section. That co-extensive power is to direct "such appropriate judgment * * * as may be just under the circumstances". If the Court of Appeals finds that the District Court has erred in a matter of law, it may reverse and remand with direction to enter an appropriate judgment. The Court of Appeals must look to the aforementioned statute defining its appropriate power for guidance as to the kind of Order which it may direct the District Court to enter and in the present case there could be no question that the Court below was vested with the power to reverse the rulings of the District Judge with direction to enter judgment for the Defendant.

We respectfully say again that the evidence in the case was susceptible of no other reasonable inference than that the work being done at the time Petitioner received his injuries was a part of the trade and business of the Respondent. The Court below concluded that the work performed by Bouligny under the contract was done in carrying on the trade or business of Respondent and when the issue was considered pursuant to the appeal from the refusal by the District Court of Respondent's motions for a directed verdict and judgment non obstante veredicto, it was a matter of law for the Court below.

Furthermore, we submit that under the applicable and controlling authorities there can be no doubt that it was strictly an issue of law for the Court to determine as to whether Petitioner's claim against Respondent under the common law was barred by reason of the terms and provisions of the South Carolina Workmen's Compensation Law. The Petitioner has not been deprived of any rights to a jury trial if the issue could not have been properly submitted for the jury's determination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgement for Respondent should be affirmed.

Respectfully submitted,
WESLEY M. WALKER
Greenville, South Carolina
RAY R. WILLIAMS
Greenville, South Carolina

APPENDIX

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
COURT OF COMMON PLEAS

CLARENCE HUDSON, PLAINTIFF, *versus*
HORRY ELECTRIC COOPERATIVE, INC., DEFENDANT.

REPORT OF SPECIAL REFEREE

The above matter was instituted in the Court of Common Pleas for this County by a Summons and Complaint under the date of November 21, 1952, in which the Plaintiff sought Judgment against the Defendant for damages on account of personal injuries alleged to have been sustained by the Plaintiff on or about August 11th, 1949, while the Plaintiff was employed by Little Electric Company and engaged in construction of an electric power line in Horry County, South Carolina.

The Defendant, in due time, filed an Answer containing some five Defenses, including a Defense by way of affirmative relief, in which a Declaratory Judgment was sought.

By an Order of Honorable Steve C. Griffith, the Presiding Judge of the Twelfth Judicial Circuit, dated February 2, 1954, the issues raised in the Fifth Defense of the Answer were referred to the undersigned as Special Referee for the purpose of determining the issues and reporting the findings of fact and conclusions of law.

Pursuant to the above Order, I held references at the Horry County Court House in Conway, South Carolina, on the 30th day of May, 1957, and the 27th day of June, 1957, and took the evidence offered by the parties. The record of such references is submitted herewith and reflects the proceedings at such references.

In view of the terms of the Order of Reference, I am presently concerned with only the issues raised by the Fifth Defense in the Defendant's Answer, and I am of the opinion,

after carefully considering the matter, that disposition of this Fifth Defense is really determinative of the entire matter.

It is undisputed, as I understand, that at the time the Plaintiff Hudson was injured, he was employed by Little Electric Company, and that at the time of such injuries, he was engaged in construction of an electric power line in the course of his employment with Little Electric; and that the electric power line on which the Plaintiff Hudson was working at the time of his accident was being constructed by Little Electric Company under a Contract with Horry Electric Co-operative, Inc. It was further admitted that at the time of this accident, both Little Electric Company and Horry Electric Cooperative, Inc. had complied with and were then operating under the Workmen's Compensation Act of the State of South Carolina. It was likewise conceded that following his injury, the Plaintiff Hudson had accepted full benefits under the Act.

As I view the matter, therefore, if the work in which the Plaintiff Hudson was engaged at the time of his accident and injury constituted a part of the business of Horry Electric Cooperative, Inc., his recovery is limited to the benefits provided by the Workmen's Compensation Act, and the Defendant would be entitled to a Declaratory Judgment or Decree to the effect that the present suit cannot be maintained.

We must, therefore, examine the facts in order to reach some determination of this issue and I shall at this point attempt to do so.

The Horry Electric Cooperative was organized as a rural Electric Cooperative on April 25, 1940, under the provisions of the Rural Electric Cooperative Act of this State. See *Sections* 12-1001, et seq., South Carolina Code 1952. The Cooperative thereupon undertook and since that time has engaged in the furnishing of electricity to residents of the rural area of this County, in compliance with the terms of the Statute. Subsequent to its incorporation, and on or about January 7, 1941, the Horry Electric Cooperative, Inc. took over from the State Rural Electrification Authority (likewise created by Statute) the lines, facilities and customers of the Authority. The Horry

Electric Cooperative has continued its operations since that time, and according to the testimony, has constantly expanded operations.

I find from the record that at the time Horry Electric Cooperative took over the operation from the State Rural Electrification Authority, there was in existence 198 miles of electric distribution line serving 753 consumers. In 1949, the Cooperative had approximately 1100 miles of distribution lines serving approximately 5500 consumers. At the end of 1956, the Cooperative had 1,590 miles of line serving approximately 7400 consumers. In 1940, the average kilowatt hour consumption was approximately 27 kilowatt hours per consumer, and by the end of 1956, the consumption had reached approximately 238 kilowatt hours per consumer. In 1949, the Cooperative had six linemen on construction work, three ground men, two linemen on maintenance work, and two truck drivers.

It is apparent, I think, that the steady growth of the Cooperative and the consistent increase in consumption of electric energy was dependent upon the construction, re-construction and maintenance of its distribution lines. As I view the matter, the construction of new lines, as well as the reconstruction, alteration and maintenance of existing lines were all vital parts of the business and trade of the Cooperative.

The record clearly indicates that the construction of new lines, the re-phasing and re-construction of existing lines has been done not only by Contract, but by the Cooperative's own employees, has been performed subject to standards prescribed by the National Rural Electrification Administration, and subject to the supervision of some Engineering Firm or Specialist. It is apparent from the record that the Cooperative owns and maintains equipment used in the construction of lines, and that it keeps on hand in its warehouse materials and supplies required in the construction of new lines, the extension of existing lines, the re-construction of lines and maintenance of its system.

Following the War, the Cooperative was faced with a backlog of requests for service and in order to meet the growing needs of this community and in order to expedite its con-

struction and conversion program, it let Contracts from time to time for portions of the work—the other portions being carried on by the Cooperative through its own employees. On or about August 31, 1949, the Cooperative entered into a Contract with Little Electric Company for the construction of 72.38 miles of new distribution line and for the conversion of 62 miles of line. At the same time that Little Electric Company was carrying out its Contract, the Cooperative was engaged in similar work at other points on its system. According to the record, the Cooperative and its employees were then doing the same type and character of construction and conversion, under the same standards and specifications as the work being done by Little Electric Company and its employees under the Contract above referred to. According to the record, the Cooperative and its employees have constructed approximately fifty per cent of the lines which have been added since the Cooperative acquired the system from the State Rural Electrification Authority. According to the testimony, in 1949, and 1950, the Cooperative constructed something in the neighborhood of 100 miles of distribution lines with its own employees. Under the Little Contract, approximately 130 to 140 transformers were to be installed, whereas, the Cooperative installed with its own employees during the year 1949, approximately 600 transformers. The only difference in the transformers would have been the capacity. In short, there appears to be no difference in the working performed under the Little Contract and the work performed by the Cooperative with its own employees.

The moving force and chief actor in the entire matter was the Cooperative itself. This becomes clear when the procedure is examined. The Cooperative obtains applications from its prospective customers. It dispatches its employees to the field for the securing of rights-of-ways. It collects the data and, in turn, transmits this to an Engineering Firm engaged by the Cooperative. This Engineering Firm renders to the Cooperative the engineering services necessary for the design and construction of the particular project. Based upon studies made by it, the Engineering Firm prepares a map of proposed new lines and proposed conversion, which, in turn, is submitted by the

Cooperative to the National Rural Electrification Administration with a request for funds to finance the proposed work. If approved by the Administrator, the necessary loan papers are prepared and executed and the work is thereafter undertaken. As to that portion of the work done by Contract, the Engineering Firm engaged by the Cooperative prepares a proposal for bids, setting forth the plans and specifications and a map of the proposed work. Subject to the approval of the Administrator of the National Rural Electrification Administration, a Contract is entered into between the successful bidder and the Cooperative. This Contract sets forth in great detail the work to be undertaken and the materials to be used. Under the Contract, portions of the materials are purchased and supplied by the Cooperative to the Contractor.

There can be no doubt that the Horry Electric Cooperative was not only engaged in the business of supplying electric energy to Rural consumers, but also in the business of constructing, re-constructing and altering lines necessary for the distribution of electric energy. There can be no doubt that the work covered by the Little Electric Contract was of the type and class which Horry Electric Cooperative was empowered by its Charter to carry out; and all of it was essential to serving the needs of its Rural communities.

The constant growth of the Cooperative's system, the increase in use of electric energy by its members indicates beyond question that lines must be re-worked and made heavier; transformers must be enlarged and lines re-phased. It is obvious that growth demands new construction. Moreover, the component parts of an electric system are expendable. Some items are short-lived.

I cannot, therefore, escape the conclusion that new construction, conversion, re-construction, re-phasing and maintenance are all integral parts of the business of the Cooperative. The work done by Little Electric Company and its employees in 1949 was a part of the trade and business of Horry Electric Cooperative.

The Plaintiff having been employed by Little Electric Company on the job in question was the Statutory employee of

Horry Electric Cooperative, Inc. at the time he sustained his injury. In the case of *Marchbanks v. Duke Power Company*, 190 S.C. 336, 2 S.E. (2d) 825, which perhaps is one of the leading cases on the subject in this State, our Court held that the employee's remedy was restricted to the Workmen's Compensation Act. In the *Marchbanks* case, the Power Company contracted for the painting of certain poles and during the progress of the work, one of the Contractor's employees was injured. An action in tort was brought against the Power Company. The Court concluded that the work being carried on was a part of the owner's trade and business, and that the worker's sole remedy was under the Act.

Reference might also be had to the case of *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E. (2d) 878, in which a similar result was reached. In the *Boseman* case, the Mill contracted for the painting of a water tank used by the Mill for protection against fire. During the course of the work, one of the Contractor's employees was killed. It was there held that the matter was controlled by the Workmen's Compensation Act inasmuch as the work upon the tank was an integral part of the business of the Mill.

The United States Court of Appeals for the Fourth Circuit recently decided a case, which is strikingly similar to the case now under consideration. The reasoning of the Court of Appeals seems unanswerable and leads to the conclusions reached in the present case. Reference might be had to the case of *Blue Ridge Rural Electric Cooperative, Inc. v. James Earl Byrd*, 238 F. (2d) 346. This case was decided October 1, 1956, the Opinion having been written by Circuit Judge Soper.

Reference might also be had to the following cases: *Kennerly v. Comulgee Lumber Company*, 206 S.C. 481, 34 S.E. (2d) 792; *Hopkins v. Darlington Veneer Company*, 208 S.C. 307, 38 S.E. (2d) 4; *Adams v. Davison-Paxon Company*, 230 S.C. 532, 96 S.E. (2d) 566.

Under the terms of the Workmen's Compensation Act, where an owner undertakes work which is a part of his business, and contracts with another for performance of that work, either

in whole or in part, the owner is liable for the payment of compensation to any workman employed in the work to the same extent as if that workman had been immediately employed by him. See Section 72-111. Where a Contractor agrees to perform work for another, and contracts with a Sub-contractor to perform all or part of the work, the Contractor is liable to pay compensation to the Workmen of the Sub-contractor. *Section* 72-112. Reference should also be had to *Section* 72-113, where provision is made for the liability of the Subcontractor to workmen of the Subcontractor. Under the provisions of *Section* 72-115, where a principal Contractor is liable to pay compensation, he may obtain indemnity from any person who would have been liable to pay compensation independently of the Sections herein involved. Under the terms of the Act, a workman may recover compensation from either the Subcontractor, or the principal Contractor, but not from both. See *Section* 72-116. The rights and remedies granted under the Statute to an employee exclude all other rights and remedies of the employee as against his employer on account of injuries, and where an employee accepts an award under the Statute, he is barred from proceeding further. See *Sections* 72-121 and 72-123.

I conclude, therefore, that the Plaintiff, having elected to accept compensation under the provisions of the Workmen's Compensation Act and having been compensated by the Carrier for Little Electric Company, cannot now maintain an action in tort against the Defendant. The Defendant is, therefore, entitled to a Declaratory Judgment to that effect.

Respectfully Submitted,
JOHN B. MCCUTCHEON,
As Special Referee.

Conway, South Carolina.
August 30, 1957.

CLARENCE HUDSON, PLAINTIFF

versus

HORRY ELECTRIC COOPERATIVE, INC., DEFENDANT.

DECREE

This matter comes before me on motion by attorneys for the defendant to confirm the report of the Special Referee dated August 30, 1957 and filed on August 31, 1957 in the office of Clerk of Court for Horry County. The notice of motion for confirmation was dated September 18, 1957 and stated that no exceptions to the report had been filed.

Subsequently, under date of September 23, 1957 a letter was received from one of the attorneys for the plaintiff indicating that exceptions were being forwarded to counsel for the defendant and asking that determination of this matter be postponed pending adjudication of a certain appeal to the United States Supreme Court in the case of *Byrd. v. Blue Ridge Electric Cooperative*. No appearance has been made before me on the scheduled date in opposition to the motion to confirm the the report of the Special Referee and there has been no showing as to what issues are being appealed to the United States Supreme Court in the Byrd Case, or the relationship of those points of appeal to the present case.

Counsel for the defendant appearing before me stated that he had refused to accept service of the exceptions and had returned them to the plaintiff's attorney who had prepared and transmitted same. Counsel further stated that a copy of these exceptions had been made before returning them and those were exhibited to me. The exceptions were not filed within the time fixed by law. No request has been made to permit the filing of same, nevertheless I have inquired into the nature of the case, considered the report of the Special Referee, reviewed the record in the cause, and, having done so, concur in the findings of fact and conclusions of law made and determined by him.

It is, therefore, on motion of counsel for defendant, ORDERED, ADJUDGED AND DECREED:

I

That the report of John B. McCutcheon, As Special Referee, dated August 30, 1957 be, and the same hereby is, confirmed and made the judgment of this Court.

II

That the Plaintiff, Clarence Hudson, having been compensated by the insurance carrier for his immediate employer, Little Electric Company, for injuries suffered by him while said Little Electric Company was engaged in work which constituted an integral part of the trade, business or occupation of the defendant Horry Electric Cooperative, Inc., at a time when both Little Electric and Horry Electric Cooperative were operating under the Workmen's Compensation Law of South Carolina, has no right to recover against the defendant at Common Law. His rights are limited to and determined by the Workmen's Compensation Law of South Carolina and since plaintiff elected to recover, and received, compensation thereunder from his employer Little Electric Company and its compensation carrier American Automobile Insurance Company he cannot recover against the defendant Horry Electric Cooperative, Inc.

III

That the matters and things set up in the defendant's Fifth Defense in its answer have been established and a declaratory judgment in favor of the defendant, denying the claim of the plaintiff, is hereby granted.

IV

Upon consideration of the record in the cause it appears that the Special Referee gave careful consideration to the evidence and the law in the report filed by him in addition to the time spent in connection with the hearings. I find that a fee of Two Hundred and Fifty ($250.00) Dollars would be proper compensation for his services, and since the matter was referred to him by consent this charge should be divided equally

Supreme Court of The United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, *Petitioner,*

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

WESLEY M. WALKER,
Greenville, S. C.

RAY R. WILLIAMS,
Greenville, S. C.

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Supreme Court of The United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, *Petitioner,*

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE APPLICATION OF *Erie R. Co. v. Tompkins*, 304 U. S. 64 IN CONNECTION WITH QUESTION II OF THE QUESTIONS PRESENTED IN RESPONDENT'S BRIEF AND POINT III OF THE POINTS IN PETITIONER'S REPLY BRIEF

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. 1652. *State laws as rules of decision.*

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (June 25, 1948, c. 646, 62 Stat. 944) (Based on Title 28 U. S. C., 1940 ed., Sec. 725 (R. S. Sec. 721))."

Title 72, *Workmen's Compensation, Code of Laws of South Carolina*, 1952.

"Sec. 72-101. When Acceptance of Provisions Presumed.

"Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner provided in Section 72-105.

"Sec. 72-111. Liability of Owner to Workmen of Subcontractor.

"When any person, in this section, and sections 72-113 and 72-114 referred to as 'owner', undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and sections 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"Sec. 72-114. Construction When Proceedings are Against Owner or Contractor.

"When compensation is claimed from or proceedings are taken against an owner or contractor then, in the application of this Title, reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed."

"Sec. 72-121. Employee's Rights Under Title Exclude all Others Against Employer.

"The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or

death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-123. Only One Remedy Available.

"Either the acceptance of an award under this Title or the procurement and collection of a judgment in an action at law shall be a bar to proceeding further with the alternate remedy."

1952 *Code of Laws for South Carolina*, Chapter 15, Rural Electric Cooperative Act.

"Sec. 12-1021. For What Purpose Organized.

"Cooperative non-profit membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas."

"Sec. 12-1025. Powers of Cooperative.

"In addition to the powers conferred on all private corporations by Sec. 12-101 a cooperative shall have power:

"(5) To construct, purchase, take, receive, lease as lessee or otherwise acquire, to own, hold, use, equip, maintain, and operate and to sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge or otherwise dispose of or encumber electric transmission and distribution lines or systems, electric generating plants, electric refrigeration plants, lands, buildings, structures, dams, plants and equipment and any and all kinds and classes of real or personal property whatsoever which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized;

"(8) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including, without limitation of the generality of the foregoing, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect to the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof

upon corporations constructing or operating electric transmissions and distribution lines or systems;

"(10) To conduct its business and exercise any or all of its powers within or without this State; and

"(11) To do and perform any and all other acts and things and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized."

SUMMARY OF ARGUMENT

I.

QUESTION II IN RESPONDENT'S BRIEF ON MERITS

The instant action is a diversity case in which Petitioner's right to maintain his alleged cause of action under common law must be determined under the provisions of the Workmen's Compensation Statute of the State of South Carolina and the decisions of the South Carolina Supreme Court construing the same. In resolving the question, it was the District Court's duty, under the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 and, under other Federal decisions applying the doctrine therein announced, to follow the decisions of the South Carolina Supreme Court in construing the statute. Under the said decisions, it was the Court's duty to search for and to apply the entire body of South Carolina substantive law governing the question in state courts.

Since the construction of a South Carolina Statute was involved, even under the decision in the case of *Swift v. Tyson*, 41 U.S. 1; 10 L. Ed. 865, the Court was bound to follow the decisions of The South Carolina Supreme Court construing and applying the statute. The Erie decision, and the other Federal decisions which have applied the Erie doctrine, rest on the sound and just concept that rights under the laws of the state are the same whether enforcement is had in the State or in Federal Courts. Petitioner's action would have been barred in the State Courts of South Carolina; a fortiori, it is barred in the Federal Court.

It is generally held that where a Federal Court's jurisdic-

tion in negligence cases is based solely on diversity of citizenship of the parties, the law of the State where the accident occurred, as to the rights and remedies of the litigants, is controlling.

At a pre-trial conference in the District Court, Petitioner's counsel stipulated that if he, the Petitioner, was the statutory employee of Respondent, within the meaning of the South Carolina Workmen's Compensation Statute when he sustained his injuries, his exclusive remedy was under the statute.

In order to resolve the question presented in the instant case, of whether Petitioner sustained the injuries of which he complains while engaged in work which constituted a part of Respondent's business, the South Carolina Workmen's Compensation Statute must be construed by applying the decisions of the South Carolina Supreme Court which have construed and applied it. The issue thus presented raises a question of law for the Court and not an issue of fact for the jury.

In construing the statute, the South Carolina Supreme Court has repeatedly declared that its basic purpose is the inclusion of employers and employees and not their exclusion and that doubts must be resolved in favor of inclusion rather than exclusion; that the true test is, in determining whether an employee of a subcontractor was engaged in work which constituted a part of the owner's business, was the employee doing something for the subcontractor which bore some reasonably direct relationship to the performance of work undertaken by the owner (otherwise called the principal contractor); that there is no distinction between coming under the statute voluntarily and coming under it compulsorily; that the owner is liable to the employees of the subcontractor for benefits under the statute, if injured while engaged in work which constitutes a part of the owner's business and that such employees are restricted to their rights of claim for compensation and cannot sue the owner for damages under the common law.

The decisions of the South Carolina Supreme Court, without exception, are in line with and support the decision of the Court of Appeals herein, as do authorities in other

jurisdictions wherever similar workmen's compensation statutes have been considered.

II.

POINT III. IN PETITIONER'S REPLY BRIEF

At the pre-trial conference in the District Court, above referred to, the Petitioner moved that Respondent not be allowed to read its affirmative defense under the Workmen's Compensation Statute to the jury on the ground that it was a legal defense, a question of law for the Court. The motion was granted and there was no appeal from the ruling. It thus became the law of the case. Having moved to exclude the defense from the jury, even if a jury question had been raised by it, which was not, the Petitioner elected not to claim the right to a jury trial of the issue by his own motion and thereby waived the right.

The meaning of the language in the Workmen's Compensation Statute that "when any person, * * * referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person, * * * (referred to as 'subcontractor') for the execution or performance by or under such contractor of the whole or any part of the work undertaken by such owner," can only be determined and applied by one who is learned in the law. The language has a special technical and legal significance which can be only gathered from a careful study of the decisions of the South Carolina Supreme Court construing it and can be applied to a special set of facts only by one who has in mind and understands the entire body of the law and its proper application to the special facts. Such determination and application is a Court function, not a jury function.

The South Carolina Supreme Court has repeatedly declared that the South Carolina Workmen's Compensation Statute was enacted primarily for the benefit, protection and welfare of working men and his dependents, to relieve them of the uncertainties of a trial in a suit for damages; to cast upon the industry in which they are employed a share of the burden

resulting from industrial accidents and to prevent the burden of injured employees and their dependents becoming charges on society; that the statute is in derogation of, or departure from, the common law and is not amendatory, cumulative or supplemental thereto, nor declaratory thereof, but wholly substitutional in character; that the statute is not compulsory; that either the employer or the employee may elect not to be bound by its provisions; that both are bound by its provisions, unless notice be given to the contrary prior to injury or death; that as to disputed facts, which do not go to the jurisdiction of the Industrial Commission, the Circuit Courts and the Supreme Court of the State are bound by the Commission's finding; but where the question is whether or not the jurisdictional fact exists entitling the claimant to be heard before the Commission, the Courts have a right to review the action of the Commission, even to the extent of finding the fact to be other than the Commission found.

If the instant action had been brought in the State Courts of South Carolina, the Petitioner would not have been entitled to have and would not have had a jury determination of Respondent's affirmative defense. He was not and is not entitled to such determination of the defense in the Federal Court under numerous decisions hereinafter listed and discussed.

ARGUMENT

QUESTION II—RESPONDENT'S BRIEF

THE QUESTION OF WHETHER PETITIONER'S INJURIES WERE SUSTAINED WHILE HE WAS ENGAGED IN WORK WHICH CONSTITUTED A PART OF RESPONDENT'S BUSINESS, TRADE OR OCCUPATION CONSTITUTED A QUESTION OF LAW FOR THE COURT AND NOT AN ISSUE OF FACT FOR THE JURY.

The decisions of the South Carolina Supreme Court, cited in Respondent's Brief on Merits herein, which construe and apply the pertinent provisions of the South Carolina Workmen's Compensation Law, make it abundantly clear that when Petitioner sustained his injuries, he was engaged in work which

constituted a part of Respondent's business under the provisions of the said law.

A. IN DIVERSITY CASES FEDERAL COURTS MUST FIND THE APPLICABLE LAW.

The present action is properly termed a diversity case and *Erie R. Co. v. Tompkins*, 304 U. S. 64, requires that federal courts in the exercise of their diversity jurisdiction follow binding state court decisions, under the doctrine of *stare decisis*, just as state courts must follow them. In *Guaranty Trust Co. v. York*, 326 U. S. 99, 108, it was held that the duty of the federal courts to follow state decisions on substantive law was the same as that of state courts:

> "Here we are dealing with a right to recover derived not from the United States but from one of the states. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a state court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state, it cannot affect recovery if the right to recover is made unavailable by the state nor can it substantially affect the enforcement of the right as given by the state."

It is now well established that in diversity cases, the Erie doctrine extends to the general field of decision the rules theretofore applicable to decisions interpreting state statutes or matters of local law. In *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 209, it was held:

> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state

court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

B. THE FEDERAL COURTS HAVE ALWAYS BEEN BOUND TO FOLLOW STATE DECISIONS AS TO INTERPRETATION OF STATE STATUTES.

We further submit that the instant case involves the interpretation of a state statute and in this respect the federal courts have always been bound to follow state decisions. In *Swift v. Tyson,* 41 U.S. 1; 10 L. Ed. 865, it was held that "laws" as used in the statute (Section 34 of the Judiciary Act of 1789, 28 U. S. C. = 725, 28 U. S. C. A. = 725; 28 U. S. C. A. 1652) did not embrace decisions of local tribunals but had reference "to the positive statutes of the state, and the construction thereof adopted by the local tribunals. . . . . ." It must be conceded that the Erie case broadened the existing rule and thereafter the words "the laws" in the aforesaid statute have been held to include in their meaning the state court decisions. The Respondent contends here that in diversity cases federal courts may not entertain suits which may not be brought in state courts or are barred by defenses controlling in state courts. The decisions applying the rule of *Erie v. Tompkins* appear to rest on the fundamental concept that rights under the laws of the state are the same whether enforcement is had in the state or federal jurisdictions.

C. THE PETITIONER PREVIOUSLY CONTENDED THAT THE ISSUE HERE INVOLVED A QUESTION OF LOCAL SUBSTANTIVE LAW OF SOUTH CAROLINA.

We call the attention of this Court to the subhead on Page 28 of Petitioner's Brief on Merits which reads as follows: "C. The record is void of the evidence required by South Carolina law to render applicable the Workmen's Compensation Act as a defense." Thereafter on Page 31 of Petitioner's Brief on Merits he makes the assertion that: "The ruling of the Chief Judge of the District Court for the Western District of South Carolina, Hon. C. C. Wyche, involved a question of local substan-

tive law of South Carolina." Then on Page 32, the Petitioner argues that, "The Court below, not having among its members a South Carolina lawyer, in reversing the action of the Chief District Judge, contrary to the accepted and usual course of judicial review, did not give weight to the judgment of the District Judge on a question of local law of a state . . . . ." After citing cases, the Petitioner argued in this same paragraph 'Appellate Courts should be slow to impute to trial courts a want of perspicacity in determining the local law, ..." It is apparent from the above pages of Petitioner's Brief on Merits that he contended the question to be one of local substantive law of South Carolina as long as the ruling by the District Judge was in his favor. However, the Court below decided that the District Judge was in error as to his construction of the South Carolina law, and Respondent contended in Question II of his argument that the issue at bar constituted a question of law for the Court and not an issue of fact for the jury. We submit that the Petitioner was unable to find decisions of the South Carolina Supreme Court to support his position and thus Petitioner ventured forth on a new course in his Reply Brief and contended in Point III that the issue at bar is a "procedural question."

D. APPLICABLE DECISIONS OF THE SOUTH CAROLINA SUPREME COURT.

We cite the following decisions of the South Carolina Supreme Court which have construed and applied the foregoing provisions of the South Carolina Workmen's Compensation law:

Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S. E. 2d 825, is considered the landmark case in South Carolina and here it was held that where an owner undertakes to perform work which is a part of his trade, business or occupation and contracts with sub-contractor for performance of such work, the owner shall be liable to pay to any workman employed in the work, any compensation which the owner would have been liable to pay if the workman had been immediately employed by the owner. It was held that the plain interpretation of the language of the statute was to make the term "owner" to be synonymous with the principal contractor, and the principal

contractor is rendered liable to injured employees of the sub-contractor. In this case it was further held that if the facts bring the case within the terms of the Compensation Act, the employee is restricted to his right of claim for compensation under the Act and this interpretation of the South Carolina Statute deprives an injured employee of his right to sue for damages under the common law. Also, the right to Workmen's Compensation is wholly statutory, not existing except under the circumstances provided in the Workmen's Compensation Acts.

In *Boseman v. Pacific Mills, et al,* 193 S.C. 479, 8 S.E. 2d 878, the South Carolina Court held the painting of a water tank used as an integral part of cotton mill business, for protection against fire, under contract whereby mill furnished materials and retained right of inspection and approval though contractor would furnish tools, ropes and rigging, was such a part of the mill's "trade, business or occupation" as to constitute the contractor a "sub-contractor" and render the mill liable for compensation for death of a workman employed to do the painting, in explosion of the tank.

In *Smith et al v. Fulmer,* 198 S.C. 91, 15 S. E. 2d 681, it was held that the true test is, "Was the employee doing something for the sub-contractor which bore some reasonably direct relationship to the performance 'of the work undertaken' by the contractor?"

In *Hopkins v. Darlington Veneer Co., et al,* 208 S.C. 307, 38 S.E. 2d 4, the South Carolina Supreme Court concluded that when dealing with one who is not an employee of the owner but the employee of the person who is performing a part of the trade, business or occupation of the owner, the guidepost in a compensation proceeding is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner, and it matters not whether the employee under such circumstances be the employee of the owner or a sub-contractor. In this case the South Carolina Court also held, "We are unable to draw a distinction between an employer who elects to come within the terms of the Act and one who is compulsory thereunder. Both are covered by the Act. To make the

distinction . . . would penalize an employer electing to come within the terms of the Act."

The basic purpose of the Compensation Act is the inclusion of employers and employees and not their exclusion, and doubts of jurisdiction must be resolved in favor of inclusion rather than exclusion. *Yeomans v. Anheuser-Busch, Inc.*, 198 S.C. 65, 15 S.E. 2nd 833; *Kennerly, et al v. Ocmulgee Lumber Co., et al*, 206 S.C. 481, 34 S.E. 2d 792.

E. SUPPORTING AUTHORITIES FROM OTHER JURISDICTIONS.

The decisions of the South Carolina Supreme Court without exception support the position of the Respondent here and authorities of other jurisdictions do likewise when comparable provisions of Workmen's Compensation Acts in those jurisdictions have been considered. *Fox v. Fafnir Bearing Co.*, 107 Conn. 189, 139 A. 778; *Continental Casualty Co. v. Haynie, et al*, 182 Ga. 60, 186 S.E. 683; *Olsen v. Canter*, 93 Ind. APP. 150, 176 N.E. 27; *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; *Isthmian S.S. Co. of Delaware v. Olivieri, et al*, (CCA 5th) 202 F. 2d 492; *Purkable v. Greenland Oil Co.*, 122 K. 720, 253 Pac. 219; *Berry v. Atlantic Greyhound Lines, Inc.* (C.A. 4th) 114 F. 2d 255, 30 F. Supp. 188; *Doane v. E. I. DuPont de-Nemours & Co.*, (C.A. 4th) 209 F. 2d 921. Also, we refer to *Clarence Hudson v. Horry Electric Cooperative Inc.*, as printed in the Appendix to the Brief on Merits for Respondent.

F. THE ISSUE CONSTITUTED A QUESTION OF LAW AND NOT AN ISSUE OF FACT.

The Court below held that the rights and remedies granted by the statute to an employee exclude all other rights and remedies of the employee as against his employer at common law or otherwise, on account of injury, (1952 South Carolina Code of Laws, 72-121); and the acceptance of an award under the statute or the procurement and collection of a judgment in an action at law is a bar to proceeding further with the alternate remedy. (1952 South Carolina Code of Laws, 72-123). The Respondent contends that the issue here arises under the provisions of the South Carolina Workmen's Compensation Law

and constituted a question of law for the Court and not an issue of fact for the jury.

We again refer to the conference with the District Judge immediately preceding trial and the stipulation by Petitioner's counsel that if Petitioner was an employee within the meaning of the Act, his exclusive remedy was proceeding under the Workmen's Compensation Act (R. 1). Also, in this conference when the stipulations were being made as to the defense under Workmen's Compensation, counsel for Respondent stated, "... the only question that would be left is: In the meaning of the Workmen's Compensation Act, was the Plaintiff the employee of Blue Ridge Electric? That would be the only question left." The counsel for Petitioner replied, "That's correct" (R. 4).

The recently decided case of *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 96 S.E. 2d 566, expressly held:

> "It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the Court, which includes the finding of the facts which relate to jurisdiction." *Knight v. Shepherd*, 191 S.C. 452, 4 S.E. 2d 906; *Tedars v. Savannah River Veneer Company*, 202 S.C. 363, 25 S.E. 2d 235, 147 A.L.R. 914; *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E. 2d 872; *Miles v. West Virginia Pulp & Paper Co.*, 212 S.C. 424, 48 S.E. 2d 26; *Watson v. Wannamaker & Wells, Inc.*, 212 S.C. 506, 48 S.E. 2d 447; *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S.C. 438, 49 S.E. 2d 718; *Holland v. Georgia Hardwood Lbr. Co.*, 214 S.C. 195, 51 S.E. 2d 744; *Younginer v. J. A. Jones Const. Co.*, 215 S.C. 135, 54 S.E. 2d 545; *Horton v. Baruch*, 217 S.C. 48, 59 S.E. 2d 545.

The Respondent has stated above that under the doctrine established in *Swift v. Tyson*, supra, the Federal Courts were under obligation to follow State decisions in their interpretation of State statutes. This also applied with regard to property rights and other matters of a strictly local character. The issue at hand involves the interpretation of the South Carolina Workmen's Compensation Law and the doctrine established by the

South Carolina Supreme Court is unequivocally set forth in *Adams v. Davison-Paxon Co.*, supra, and the South Carolina decisions cited therein. It cannot be disputed that the *Erie* case broadened the existing rule as to local law and the application of the Erie doctrine requires the conclusion that the question of whether Petitioner's injuries were sustained while he was engaged in work which constituted a part of Respondent's business, trade or occupation constituted a question of law for the Court. The Respondent respectfully submits that question was correctly decided by the Court below and the proper application of the South Carolina decisions was made when it sustained Respondent's basic defense that Petitioner's recovery was limited to the benefits provided by the Workmen's Compensation Act of the State of South Carolina.

G. APPLICABLE FEDERAL DECISIONS.

The Petitioner seeks to recover against Respondent at common law and any right he might have had to recover has been made unavailable by the State of South Carolina in its enactment of its Workmen's Compensation Law and the acceptance by Petitioner of benefits thereunder. It is generally held that where Federal Court's jurisdiction in a negligence case is based solely on diversity of citizenship of the parties, the law of the State where the accident occurred must control. *Westland Oil Co. v. Firestone Tire & Rubber Co.*, C.C.A.N.D. 1944, 143 F. 2d 326. See, also, *Reeves v. Philadelphia Import Co.*, C.C.A. Pa. 1945, 150 F. 2d 854; *Capetola v. Barclay White Co.*, C.C.A. Pa. 1943, 139 F. 2d 556, 153 A.L.R. 1046, certiorari denied 64 S. Ct. 939, 321 U.S. 799, 88 L.Ed. 1087; *Moore v. Chicago, B. & Q. R. Co.*, D.C. Mo. 1939, 28 F. Supp. 804.

In *Warlich v. Miller*, (C.A. 3rd) 141 F. 2d 168, it was held that the tort law of the State in which operative facts occurred and in which suit for personal injuries was brought in Federal Court controlled the rights and liabilities of the litigants. Also, in a tort action in Federal Court, the law of the State in which the alleged tort was committeed was determinative of existence of a legal injury. *Vancouver Book & Stationery Co. v. L. C. Smith & Corona Typewriters*, C.C.A. Or. 1943, 138

F. 2d 635, certiorari denied 64 S. Ct. 780, 321 U.S. 786, 88 L. Ed. 1077.

In *Northern Pacific Ry. Co. v. Meese*, Wash. 1916, 36 S.Ct. 223, 239 U.S. 614, 60 L. Ed. 467, this Court held that the Federal Courts must accept the conclusion of the highest State Court that the Washington Workmen's Compensation Act, Wash. Laws 1911, ch. 74, took away an existing right under Rem. & Bal. Code, §§ 183, 194, to maintain an action for the wrongful death of an employee, not only as against the employer, but as against any third person by whose negligence the death may have been caused, where the employee sustained the fatal injury while engaged about his ordinary duties at his employer's plant.

Also, in determining whether employee of Texas employer could maintain common law action for injuries on ground that employee did not receive his injury in course of his employment, and hence was not within Texas Compensation Law, *Vernon's Ann. Civ. St.* art. 8306, § 3; art. 8309, § 1, second subd. 4, the law of Texas applied. *Johnson v. Bederman*, C.C.A. Ill. 1945, 149 F. 2d 515.

In considering the legal relationship and liability of employer to employee and relationship of third party tort feasor to employee and to employer, arising out of employee's death in West Virginia, Federal Court must examine *West Virginia Workmen's Compensation Act, Code W. Va.* 1931, 23-1-1 et. seq., and West Virginia decisions applicable to it and to the principle of common-law subrogation. *Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co.*, C.C.A. W. Va. 1940, 115 F. 2d 277, certiorari denied 61 S.Ct. 807, 312 U.S. 702, 85 L.Ed. 1135.

There are numerous Federal decisions fully supporting the position of Respondent that the State Supreme Court's construction of its Workmen's Compensation Act is binding on the Federal Court. Among these decisions are:

Vandenbark v. Owens-Illinois Glass Co., 61 S. Ct. 347, 311 U. S. 538; *Bagnel v. Springfield Sand & Tile Co.*, (C. A. 1), 144 F. 2d 65, certiorari denied 65 S. Ct. 72, 323 U. S. 735; *Waldron v. Aetna Casualty & Surety Co.*, (C. A. 3) 141 F. 2d 230; *Funk*

v. Hawthorne, (C.A. 3), 138 F. 2d 686; *Travelers Ins. Co. v. Burden*, (C. A. 5), 94 F. 2d 880; *Mobile & O. R. Co. v. Industrial Commission of Illinois*, (C. A. 7), 28 F. 2d 228; *Warlop v. Western Coal & Mining Co.*, (C. A. 10), 24 F. 2d 926; *Delaware Coach Co. v. Savage*, D. C. Del. 1946, 68 F. Supp. 175.

H. THE WORK BEING DONE WAS A PART OF THE TRADE AND BUSINESS OF RESPONDENT.

If the operations of respondent are examined in the light of the above cited decisions of the South Carolina Court, which have construed and applied the provisions of the South Carolina Workmen's Compensation Law, it is clear that petitioner sustained the injuries complained of while engaged in work which constituted part of respondent's trade and business and that his only remedy is under the provisions of the South Carolina Workmen's Compensation Law. The construction, the reconstruction, the maintenance, the repair work, carried on by respondent on its system, is so involved in the normal and effective operation of the system as to make the same an important and essential part of its business operations under the provisions of the South Carolina statutes quoted at the beginning of this Brief.

The construction and operation of an electric distribution system is in no sense comparable to the construction and use of a building as a store or manufacturing plant, as argued by petitioner in his Reply Brief. An electric distribution system is by nature and within itself operational in character as its component parts are expendable, some of them being necessarily short lived. In the very nature of things, such a system can never be completely constructed. Additions must be made to and alterations must be made in it from day to day to enable it to meet an increasing public demand for power. Because of the unique nature and character of an electric distribution system, because of the fact that construction work on the system must be continuous and never ending, the South Carolina General Assembly provided in the Cooperative Act under which respondent was organized, that electric cooperatives shall have power to carry on construction work on systems as part of their

operations (1952 *Code of Laws for South Carolina*, 12-1025 (5) (8) (10) (11)).

The major problem of an electric cooperative, the purpose of and justification for its existence, is the delivery of electric energy to consumers, existent and potential. Implicit in its operations is construction work, original construction, alterations, and re-construction. Mr. E. V. McMahon, the Chief Engineer of Southern Engineering Company of Atlanta, Georgia, who designs and has general supervision over all of respondent's construction work, testifying in the District Court with respect to such work, said:

> "The cooperative is constantly engaged in construction work. They are constantly building new lines to new consumer members, of various lengths, some short, some long, depending on the circumstances and the location of the consumers with regard to the existing system. * * * The construction crews of the Blue Ridge Electric Cooperative are constantly doing construction work. These Blue Ridge Electric Cooperative crews are faced with the problem daily of building new construction to new consumer members, at various distances from the existing line." (R.45).

During the comparatively short period of its existence prior to the trial of the action herein in the District Court, respondent has constructed approximately 1700 miles of line, constructing and installing in connection therewith necessary appurtenant new facilities, to serve approximately 9300 new members. Although it kept a crew of eight linemen and eight groundmen busily engaged in construction and repair work, at times the respondent found it impossible to keep up with all needed construction with its own workmen. At such times, it let special contracts for portions of the work, such as that called for in the Bouligny contract in the case before this Court. Even when construction work is done by contract, there are many details in connection with it to claim the attention of respondent and to require action on its part, such as arranging for the making of plans and specifications for the work, the securing of rights-of-way and franchises, the application for the purchasing and handling of materials used on the project, the checking

of reports filed by the contractor and the engineer, and the disbursement of funds as the work progresses. With further reference to work done by respondent's employees, Mr. McMahon, the engineer, said:

> "The cooperative also has to maintain their existing transmission system. By that I mean replacing insulators and stringing in new wire, due to lightning damage or other operating hazard. The cooperative also finds it necessary to work in their sub-stations, re-setting breakers, re-working damaged equipment and/or supervising it, and re-setting existing regulators." (R.45).

In building its distribution system, original lines and facilities are so designed by the engineer for each community in respondent's territory as to reasonably meet the needs of such community. Since completing this original construction, however, the system growth has been so rapid, and so great, that with the passing of years, the lines and facilities have become inadequate, first in one community and then in another. Wherever and whenever this has occurred, it has been necessary to re-work and/or re-build or replace such lines and facilities including sub-stations.

When testifying with respect to this phase of respondent's work, Engineer McMahon said:

> "They also in many instances find it necessary to 'heavy up' as we call it, or increase the load capacity of their existing system to handle power loads." (R.45).

Most of the work called for in the Bouligny contract was to heavy up parts of respondent's system. 87.69 miles of line and appurtenant facilities were re-worked and/or re-built or replaced under the contract, as against only 24.19 miles of new line construction. The Walhalla sub-station was constructed under the contract to deliver a power load for the Ebenezer community of 44,000 KW as against 7,200 KW then available to the community. The Ebenezer line, on which petitioner was working when he sustained his injuries, was changed from a one-phase to a two-phase line under the contract. The change

involved the running of a second line on cross-arms along the existing Ebenezer line, with a few minor changes of location being made in the two-phase line. The petitioner was attempting to extend the Ebenezer line into the sub-station when he received his injuries. At this time the Ebenezer line was connected to an insulator on the outside of the sub-station. The line was energized but no part of the sub-station was. No energy was feeding into the sub-station. The petitioner reached out of the sub-station and caught or touched the Ebenezer line when attempting to make a measurement to determine the length of an extension needed to bring the Ebenezer line into the sub-station. Throughout all the briefs filed herein, petitioner has studiously avoided any reference to the work in which he was directly and actually engaged at the time of his injuries. On pages 14 and 15 of his Reply Brief and on pages 10 and 11 of his Brief on Merits, he does, however, inadvertently concede that line work, at least, constitutes a part of respondent's business.

In his unrestrained zeal, petitioner even goes so far in his Reply Brief as to assert there is no evidence in the Record to show that sub-stations are necessary facilities in respondent's operating system and complains that the evidence does not show what purpose sub-stations serve in the system. The evidence shows that respondent had six sub-stations in use at the time of the trial of the case in the District Court. It shows that the sub-stations, whose construction was called for in the Bouligny contract, were designed for respondent by Mr. McMahon, a highly trained skilled engineer of vast experience. The specifications for the construction of the double circuit distribution system leading out of one of the sub-stations were prepared by respondent's construction superintendent. (R.44). The evidence further shows that the National Rural Electrification Administration approved the construction of the sub-stations; as designed by the engineer and in keeping with his specifications and that it lent respondent thousands of dollars to defray the cost of the sub-stations. What more evidence could be wanted as to their need?

When respondent's day to day operations are reviewed in

all of their phases and parts, in their entire nature and scope, the conclusion is inescapable that construction work in its various aspects is as much a part of respondent's job as is the delivery of electric energy to consumers, because the two are inseparable. Respondent's requirements and operations are not unique in the field of electric distribution. The same pattern of operation is followed by other electric cooperatives and, no doubt, by private utilities as well.

The Court below, after a careful documentation of all facts and circumstances relating to jurisdiction pursuant to application of the Workmen's Compensation Act, concluded that the work performed by the Bouligny Construction Company under the contract was done in carrying on the trade or business of the cooperative. The other requirements of this defense were expressly admitted into the Record by petitioner in the District Court including the admission that after the injury, petitioner had accepted and received full compensation benefits. The issue in this defense involved substantive law of South Carolina which was clearly and correctly applied in the opinion of the Court below.

POINT III IN PETITIONER'S REPLY BRIEF

It would appear that in his Point III, the Petitioner would contend the basic issue here to be a procedural matter governed by the Federal Rules of civil procedure and not a question of law that has been decided by the South Carolina Supreme Court. The respondent submits that the issue constitutes a question of law and there can be no doubt about how the question has been previously decided by the highest court in South Carolina.

A. MODE OF TRYING ISSUE, RAISED BY RESPONDENT'S AFFIRMATIVE DEFENSE UNDER WORKMEN'S COMPENSATION STATUTE, DETERMINED IN DISTRICT COURT ON PETITIONER'S MOTION PRIOR TO TRIAL.

At the conference immediately preceding trial in the District Court held at chambers by the Trial Judge, the petitioner made a motion to exclude from the jury's consideration the respondent's affirmative defense that petitioner's action was bar-

red under the provisions of the South Carolina Workmen's Compensation Law. *This motion was granted.* At the conference, the District Judge re-stated the motion made by Petitioner as follows: "* * * You are moving that they not be allowed to read that defense before the jury because it is a legal defense, purely a question of law and must be decided on legal grounds? Is that what you are moving for?" Petitioner's counsel replied, "That is the first motion." (R.2) In granting the motion, the Court said (R. 4, 5):

> "You are willing, then, as I understand, to admit —not to be published before the jury, but for the purpose of any motion made upon the law in the case— you are willing to admit he did receive compensation in the amount he did receive?"
> Mr. Hammer: "Yes, sir."
> The Court: "On the record, but not in the presence of the jury." * * *
> * * * * *
> The Court: "I am going to let you prove anything you want to prove outside the presence of the jury on this Workmen's Compensation Act. As far as the trial of this case before the jury is concerned, as I said before, it's dwindled into a very narrow issue, as I see it. I may be wrong. The Circuit Court of Appeals may say I am wrong. But I think as far as the Workmen's Compensation proposition is concerned, it's purely a question of law; * * * *".

There was no appeal taken from the Court's ruling on the motion and accordingly, it became the law of the case. It would have been shocking indeed if the petitioner had attempted to appeal to the Court of Appeals from the favorable ruling on his own motion. It is more shocking that petitioner should now attempt to question the favorable ruling on his own motion in this honorable Court.

If the defense had raised an issue for jury determination, as it clearly did not, the petitioner elected to withdraw the issue from the jury by his own motion and thereby waived the right to a trial of the issue by the jury, if such right had existed. The petitioner is obviously reversing his field on questions

herein from Court to Court and appears to feel that each appeal is a new trial of new issues instead of an appeal from rulings made in an inferior court.

On trial of the petitioner's alleged cause of action in the District Court, the respondent offered pertinent testimony as to the nature and scope of its operations, as to the nature and scope of the work of its employees, and as to the nature and scope of work done by respondent by contract, but in offering the testimony, respondent did not make and, under the ruling of the Court, was not permitted to make reference to workmen's compensation for any purpose. The testimony offered served a dual purpose: it had some relation to the issues raised by petitioner's alleged cause of action and it proved facts, along with other facts admitted in the record at the pre-trial conference, for the Court's determination of the affirmative defense which was a question of law and not before the jury.

B. MEANING AND APPLICATION OF LANGUAGE IN STATUTE, HAVING SPECIAL TECHNICAL AND LEGAL SIGNIFICANCE, FOR COURT, NOT FOR JURY.

It would be an innovation indeed in the law to require a jury to try an issue on facts concealed from it, as petitioner here contends for. In his Complaint, petitioner alleges a claimed right and its violation, an alleged cause of action against respondent under common law. In its Answer, respondent alleges that the claimed right is non-existent; that petitioner's only right and remedy is a substitutional right and remedy under the Workmen's Compensation Laws of South Carolina. The question thus raised is not one of procedure as now argued in this Court by petitioner. It cuts much more deeply. It is a question of substantive law of South Carolina. In order to resolve it, the South Carolina statute must be interpreted and construed which is a function reserved to the Court and not for the jury. If the petitioner's motion to have the question determined by the Court as a matter of law had not been granted, if the matter had been left open for determination without any motion prior to the beginning of the actual trial, it would have been the Court's duty to resolve the question in the absence of the

jury and without its aid upon proper motion at the close of the trial. The petitioner made a motion to strike the defense at the close of respondent's testimony and the District Judge again ruled that the issue involved a question of law. (R. 48, 49). Immediately thereafter when the petitioner failed to offer any testimony in reply, the respondent moved for a directed verdict primarily upon the grounds that petitioner's action was barred by reason of the application of the terms and provisions of the South Carolina Workmen's Compensation Statute. In due time respondent moved for judgment in favor of the defendant non obstante veredicto and upon appeal, the Court below concluded that respondent's motion for a directed verdict should have been granted and, failing this, the subsequent motion for judgment in its favor non obstante veredicto should have been granted. The Federal Courts have never hesitated to declare the law when it has become their duty to do so. The case of *Herron v. Southern Pacific Co.*, 283 U. S. 91, cited by petitioner in his Reply Brief, makes it plain that the Federal Courts will not shirk their duty to declare the law, even when a sovereign state, by constitutional provision, attempts to convert questions of law for the court into questions of fact for the jury.

C. STATUTE IN DEROGATION OF COMMON LAW AND WHOLLY SUBSTITUTIONAL THEREFOR.

In *Caughman v. Columbia Y. M. C. A.*, 212 S.C. 337, 47 S. E. 2d 788, the South Carolina Supreme Court said:

> "It was stated in *Marchbanks v. Duke Power Co. et al.*, 190 S. C. 336, 2 S. E. 2d 825, 836, that Workmen's Compensation Acts 'are in derogation of, or departures from the common law, and are not amendatory, cumulative or supplemental thereto, nor declaratory thereof, but wholly substitutional in character.' In *Tedars et al*, 202 S. C. 363, 25 S. E. 2d 235, 243, 147 A. L. R. 915, the Court said: 'To great extent the whole scheme of workmen's compensation is to place the economic burden of industrial accidents upon industry rather than upon the workers and their dependents, and as to the latter thereby rendered indigent, upon the State.' It was said in *Cokeley et al v. Robert E. Lee, Inc.*, 197 S. C. 157, 14 S. E. 2d 889,

893, that compensation laws 'were enacted primarily for the benefits, protections and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society.'"

Also, see *Hopkins v. Darlington Veneer Co., et al*, supra, where the South Carolina Supreme Court held:

> "We are unable to draw a distinction between an employer who elects to come within the terms of the Act and one who is compulsory thereunder. Both are covered by the Act."

We respectfully submit that the South Carolina law is not correctly stated by petitioner on page 19 of his Reply Brief in regard to power of the South Carolina Supreme Court to review findings of fact of the Industrial Commission or the lower reviewing court. It might be said here that the claim petitioner attempted to assert in the District Court was not for his workmen's compensation benefits which he had already accepted and been paid in full. The issue is a question of law as to whether this attempt by petitioner to assert a claim at common law has been made unavailable by the application of the workmen's compensation statutes. In *Knight v. Sheppard*, 191 S. C. 452, 4 S. E. 2d 906, the court held:

> "It is suggested that we are bound by the fact finding of the South Carolina Industrial Commission, which held that it lacked jurisdiction. It is true that as to disputed facts which do not go to the jurisdiction, we are bound by the finding of the Commission, but where the only question presented is whether or not the jurisdictional fact exists entitling the claimant to be heard before the Commission, we have a right to review the action of the Commission, even to the extent of finding the fact to be other than the Commission found it.
>
> "We are unable to perceive any sound reason why South Carolina should be denied the right to apply in our own Courts our own statute enacted in pur-

suance of State policy to provide compensation for employees suffering injury or death within the State while engaged in the course of their employment. The Workmen's Compensation Law of our State expresses our domestic policy in its application to persons and events within the State."

The question of whether employers and employees, under varying facts and circumstances, are covered under the provisions of the South Carolina Workmen's Compensation Statute or are excluded from the provisions thereof requires an interpretation and construction of the statute. The question is one of law and the South Carolina Supreme Court has so treated it time and again in a long and unbroken line of decisions, including the following: *Marchbanks v. Duke Power Company*, supra; *Knight v. Sheppard*, supra; *Boseman v. Pacific Mills*, supra; *Kennerly v. Ocmulgee Lumber Company*, supra; *Hopkins v. Darlington Veneer Company*, supra; *Caughman v. Columbia Y. M. C. A.*, supra, and *Adams v. Davison-Paxon Company*, supra. Also, we refer to the opinion of the South Carolina Circuit Court in *Hudson v. Horry Electric Cooperative*, which was printed in the appendix to respondent's Brief on Merits.

D. PETITIONER'S ACTION BARRED IN STATE COURTS—LIKEWISE BARRED IN FEDERAL COURTS.

We submit that wherever the Federal Courts have dealt with the question of whether employers and employees, under varying facts and circumstances, have been covered under or excluded from the provisions of workmen's compensation statutes of the several states, the courts have treated the question as one of law and have followed state decisions in their interpretation of the respective state statutes. In *Guaranty Trust Company of New York v. York*, supra, this Court said:

"*Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of

> the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result."
>
> • • • • •
>
> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."

At the conclusion of respondent's evidence in the District Court when petitioner moved to strike the defense that barred his claim by reason of application of the Workmen's Compensation Act, the District Judge inquired of petitioner's counsel if they contemplated offering any testimony in reply. Also, the District Judge ruled that it was a question of law and he was holding the question open in order that respondent might include that ground in its motion for the direction of a verdict (R. 48, 49). In the light of this and in spite of it, petitioner did not see fit to offer any testimony on the question, if he had any, which he obviously did not as his counsels' statements disclosed. When petitioner's Point III in his Reply Brief is examined in the light of the record and of the basic issue involved, it is found to be without merit. Further, we emphasize that the United States Constitution does not guarantee trial by jury of questions of law which are to be decided by the Court and the question in this instance was obviously one of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner's injuries were sustained while he was engaged in work which constituted a part of respondent's trade and business. The question involved a matter of law for the Court un-

der the law of South Carolina pursuant to its Workmen's Compensation Statute. The doctrine of *Erie v. Tompkins* must be applied and the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgment for respondent should be affirmed.

Respectfully submitted,

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Office - Supreme Court
JUN 13 1958
JOHN T. FEY

Supreme Court of The United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, *Petitioner*

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR RE-HEARING

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR RE-HEARING

THE RESPONDENT-PETITIONER PRAYS THAT THIS COURT GRANT A RE-HEARING OF PART II OF THE MAJORITY OPINION DELIVERED BY MR. JUSTICE BRENNAN ON MAY 19, 1958, REMANDING THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. THIS PETITION IS BASED UPON THE GROUNDS HEREINAFTER SET FORTH.

FIRST

In deciding that the Federal Courts should not follow what the majority opinion designates as a State rule and in holding that on remand of the case to the Fourth Circuit Court of Appeals and from that Court to the Federal District Court, if not made unnecessary by the decision of other questions, the factual issue must be decided by the jury rather than by the Court, it is respectfully submitted that the Court overlooked or misapprehended prior decisions of this Court to the effect that the Workmen's Compensation Acts of the States and of the District of Columbia abolish all rights, both of the employer and the employee under the common law, and substitute there-

for statutory rights, unknown to the common law, which are equitable in nature. The Court has held in these decisions that the acts do not violate the Seventh Amendment to the Constitution in taking away the right of trial by jury and in submitting therefor the modes of determining factual issues as therein provided. That accordingly in the matter presently before the Court, the South Carolina Workmen's Compensation Act has completely divested the jury of any function in deciding questions pertaining to the defense based upon the act and that all questions both of law and of fact must be decided in accordance with the terms and provision of the South Carolina Act and the interpretation placed thereon by the South Carolina Supreme Court.

One of the decisions which it is respectfully contended was overlooked by the Court is the case of *Mountain Timber Company v. State of Washington*, 37 S. Ct. 260, 243 U. S. 219. In that case, the State of Washington instituted action to recover certain premiums due by the Mountain Timber Company which will be hereinafter referred to as the Company. It was contended that these premiums were due under the Workmen's Compensation Act of that State. The Company demurred, raising constitutional objections to the Act. The Supreme Court of Washington overruled the objections and affirmed the judgment in favor of the State. Upon appeal to the United States Supreme Court, the judgment of the State Courts was affirmed.

Of the constitutional objections raised by the Company, the one pertinent here was the objection that the Act was unconstitutional in that it violated the Seventh Amendment. Concerning this, this Court said:

> "This 7th Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the State courts (*Minneapolis and St. L. R. Co. v. Bombolis*, 241 U. S. 211, 217, 60 L.ed 961, 963, L.R.A. 1917A, 86, 36 Sup. Ct. Rep. 595), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the Federal Courts in cases that are within its provisions. So far

as private rights of action are preserved, this is no doubt true; but, with respect to those, we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury."

In *New York Central Railroad v. White*, 243 U.S. 188, 37 S.Ct. 247, 254, this Court said:

"No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th Amendment. The denial of a trial by jury is not inconsistent with 'due process.' *Walker v. Sauvinet*, 92 U.S. 90, 23 L.ed 678; *Frank v. Mangum*, 237 U.S. 309, 340, 50 9 Led. 960, 985, 35 Sup. Ct. Rep. 582."

The foregoing quote was said in connection with a similar attack upon a similar Workmen's Compensation Act, this time the Act being attacked under the 14th Amendment instead of the 7th.

In *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615, an attack was made upon the National Labor Relations Act based upon the Seventh Amendment. Concerning this attack, this Court said:

"Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for time lost by the discharge, less amounts earned by the employee during that period. This part of the Order was also authorized by the Act. (Section 10 (c)). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars; the right of trial by jury shall be preserved.' The amendment thus preserves the right which existed under the common law when the Amendment was adopted." (Cases cited). "Thus, it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is

not in the nature of a suit at common law. *Guthrie National Bank v. Guthrie,* 173 U.S. 528, 537, 19 S. Ct. 513, 43 L ed. 796.

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

Also, see *Rowlette v. Rothstein Dental Laboratories, Inc.,* 63 F. 2d 150. Cert. den. 289 U.S. 736, 53 S. Ct. 657; *Scrinko v. Reading Co.,* 117 F. Supp. 603 *Agwilines, Inc. v. National Labor Relations Board,* 87 F. 2d 146.

The foregoing cases amply show that this Court has on prior occasions determined that Workmen's Compensation Acts of the various states and other similar social legislation are wholly substitutional in character and are in derogation of the common law creating rights and remedies which were unknown to the common law. These statutes are equitable in nature and it is respectfully submitted that the guarantee of the Seventh Amendment has nothing to do with these acts. Therefore, all questions concerning these acts are for determination by the Court and no jury issue is presented by raising the terms and provisions of the Act as a defense.

SECOND

In making the decision reflected in Point II of the majority opinion, it is respectfully submitted that the Court overlooked or misapprehended the fact that the defense of the Respondent-Petitioner strikes at the jurisdiction of the Federal District Court over the cause of action as contradistinguished from a factual immunity. Questions pertaining to the jurisdiction of a Court over the person or subject matter are unquestionably legal in nature and impose questions to be decided by the Court and not by a jury.

It must be kept in mind that the answer to this jurisdictional question involved a great deal more than the sole

issue with which this Court deals. Other pertinent issues, both legal and factual and some consisting of a mixture thereof, had been previously eliminated by concession and admission of counsel in the pre-trial conference. The sole remaining issue is said to be a factual one, but we submit that it is so entwined with a knowledge of the defense in its entirety, with the case law of the State of South Carolina which formulates the tests to be applied in determining this issue, and with the theory and effect of the Workmen's Compensation Act of that State, that it requires a decision by a legal mind rather than the lay juror.

The majority opinion is predicated upon the thought that the question for determination is purely a factual one which is ordinarily to be passed upon by the jury. But it is submitted that the Court has remanded this case with directions that, if it be made necessary by the decision of the Court of Appeals on the other defenses, the jury determine whether the District Court has jurisdiction of the matter. The Federal System of allocating functions between Judge and jury does not require this.

That the defense strikes at the jurisdiction of the Federal District Court is beyond question. *Marchbanks v. Duke Power Company*, 190 S.C. 336, 2 S.E. 2d, 825; *Bozeman v. Pacific Mills, et al.* 193 S.C. 479, 8 S.E. 2d, 878; *Smith et al. v. Fulmer*, 198 S.C. 91, 15 S.E. 2d 681; *Hopkins v. Darlington Veneer Company, et al.* 208 S.C. 307, 38 S.E. 2d 4; *Adams v. Davison-Paxon Company* 230 S.C. 532, 96 S.E. 2d 566, and other cases cited in footnote 8 in the majority opinion dealing with point II.

The foregoing South Carolina Supreme Court decisions adequately show that the question presently before the Court is a question of the jurisdiction of the Federal District Court. Questions of jurisdiction must be said to be matters of substantive law rather than procedural. The theory of *Erie R. Co. v. Tompkins*, 304 U.S. 64, requires that this Court follow the substantive law of South Carolina in determining this issue.

In this connection, it must be remembered that the South Carolina Workmen's Compensation Law is not mandatory; either the employer or the employee may elect not to be bound by the Act. Failure to so elect, however, binds both to the

rights and obligations of the Act. Here, neither party had elected not to be bound under the act. Both are therefore bound by the terms and provisions of the Act. Neither party could complain because the act was in derogation of the common law and took away the right to a trial by jury. The South Carolina Supreme Court in the case of *Bagwell v. Ernest Barwell, Inc.* 227 S.C. 168, 87 S.E. 2d 583, said:

> "At the outset, it might be stated that the Workmen's Compensation Act is a form of social legislation wherein and whereby the employer and employee surrender benefits previously enjoyed under the common law in exchange for other benefits provided under the Act."

We most respectfully submit that the Court in the majority opinion overlooked the fact that the parties had elected to have the Court rather than the jury determine all matters, both of fact and of law, with regard to the defense raised asserting the provisions of the Workmen's Compensation Act.

THIRD

The majority opinion in discussing Point II based its decision upon its determination that the South Carolina Supreme Court in the long line of decisions represented by the case of *Adams v. Davison-Paxon Co.*, supra, expressed no reason why the Court must decide the jurisdictional question including the factual findings implicit therein. It is respectfully submitted that the reasons for these decisions are inherent.

First, being a jurisdictional problem, it is within the function of the Court rather than jury to determine the solution.

Secondly, the Act has abolished all rights existing under the common law, including the right to trial by jury, and has substituted the rights and obligations of the Act therefor. Accordingly, there is nothing for jury determination.

Thirdly, while some factual determinations must be made under the terms and provisions of the Act, these factual matters are so bound up with other considerations dealing with the rights and obligations of those operating under the Act as to require a judicial decision, and to permit a jury, who has no

knowledge of these other considerations, to pass upon an isolated question of fact would result in prejudice to the parties.

Fourthly, determination of matters pertaining to the Act by the Court results in a uniform enforcement of rights and obligations. If the majority decision relative to Part II be carried to its logical conclusion, it is possible for an injured workman to receive benefits under the Act from the statutory employer and then sue in the Federal Courts at common law contending the Industrial Commission did not have jurisdiction. If the Court decides the issue, it would be bound by the State Court's decision; if the jury must decide, then it would be not so bound and the Act would not receive uniform enforcement.

FOURTH

The Court committed error in prejudging that if the Court of Appeals remands the case to the District Court, evidence will be adduced which will require the submission of an issue of fact to the jury pursuant to the subject defense under the South Carolina Workmen's Compensation Act. Under the majority Opinion of the Court, as written, the Trial Court would feel compelled to submit an issue of fact to the jury under the defense, regardless of the nature of the testimony which might be offered. How can the Court foretell what testimony will be offered touching the issue and hold in advance, as has been done, that testimony will be offered which will raise an issue of fact for the jury?

CONCLUSION

We respectfully request this honorable Court to grant this Petition for Re-Hearing and to reconsider Part II of the majority opinion delivered on May 19, 1958.

Respectfully submitted,

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CERTIFICATE

The undersigned counsel do hereby certify that this Petition for Rehearing in behalf of Respondent is presented in good faith and not for delay.

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